Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

FULL VALUE ADVISORS, LLC,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 13(f) of the Securities Exchange Act of 1934 violates the First Amendment as applied to compel a private hedge fund investment advisor to disclose its securities holdings, and hence, reveal its proprietary research and investment ideas to others that copy and profit from it, when the S.E.C. has conceded that § 13(f) has not meaningfully advanced a legitimate regulatory purpose.

2. Whether the Court of Appeals erred in applying "rational" basis review to of § 13(f)'s compelled disclosure of fully-protected non-personal expression of opinion about securities.

3. Whether, even if commercial speech standards could apply, the Court of Appeals erred in applying the *Zauderer* rational basis standard instead of the *Central Hudson* test, when § 13(f) disclosures are not aimed at preventing deception or curing misleading speech.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Full Value Advisors, LLC has no parent corporation and no publicly held company holds 10 percent or more of Full Value Advisors, LLC.

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* Please note that Appendix G reproduces Section 13(f) in its current, updated and renumbered form, whereas the Petition refers to the pre-Dodd-Frank numbering of Section 13(f) to correspond to the decision below. As noted in the decision below (App. A at 2a n.1), on July 22, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act renumbered paragraphs (2), (3), (4), and (5) of Section 13(f) as paragraphs (3), (4), (5), and (6). Thus, please note that references in the Petition to paragraphs 13(f)(2), (3), (4) and (5) correspond, respectively, to paragraphs 13(f)(3), (4), (5), and (6) in Appendix G at 131a-33a.

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JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on February 4, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This case involves the First Amendment to the United States Constitution (reprinted at App. F, 127a), Section 13(f) of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78m(f) (App. G, 128a-33a)[1], and

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[1] As noted in the decision below (App. A at 2a n.1), on July 22, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act renumbered paragraphs (2), (3), (4), and (5) of Section 13(f) as paragraphs (3), (4), (5), and (6). (App. A at 2a n.1) For ease of reference to the decision below, this Petition also uses the pre-Dodd-Frank numbering for Section 13(f). But Appendix G reproduces Section 13(f) in its current, updated and renumbered form. Thus, please note that references in the Petition to Section 13(f)(2), (3), (4) and (5) correspond, respectively, to Sections 13(f)(3), (4), (5), and (6) in Appendix G at 131a-33a.

Securities Exchange Act Rule 13f-1, codified at 17 C.F.R. § 240.13f-1 (App. H, 134a-35a).

STATEMENT OF CASE

Petitioner seeks review of the decision below rejecting its contention that Section 13(f) of the Exchange Act of 1934 ("Section 13(f)" or "§ 13(f)") violates the First Amendment as applied to compel a private hedge fund investment advisor to disclose its securities holdings, and hence, reveal its proprietary research and investment ideas to others that copy and profit from it, when the S.E.C. has conceded that § 13(f) has not meaningfully advanced a legitimate regulatory purpose.

A. Section 13(f)

Section 13(f), passed in 1975, requires institutional investment managers with investment discretion over accounts totaling $100 million or more to file quarterly reports ("13F Reports") with the Securities and Exchange Commission ("SEC") disclosing details of their securities holdings. Each manager must disclose, for each security held, "the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value." 15 U.S.C. § 78m(f)(1) (App. G at 129a); 17 C.F.R. § 240.13f-1. SEC Form 13F requires additional disclosure of a manager's level of investment discretion and voting authority for each security. (Form 13F App. I at 151a-154a)

Section 13(f) is explicitly a public disclosure requirement. It states that "[p]romptly after the filing of" a 13F Report, the SEC "shall make the information

contained therein conveniently available to the public." 15 U.S.C. § 78m(f)(3). The legislative history of § 13(f) states that "rapid dissemination of the institutional disclosure information to the public is a fundamental purpose of the bill." S. Rep. No. 94-75, at 83, *reprinted in* 1975 U.S.C.C.A.N. 179, 266, (App. J at 182a), (Cites to this Report are hereinafter "App. J at ___").[2]

Notably, unlike most securities disclosure requirements, § 13(f) compels disclosure by private investment managers, like Petitioner, who do not publicly solicit investments. 15 U.S.C. § 78m(f)(5)(A), (App. G at 133a), (defining "institutional investment manager" to include "any person exercising investment discretion with respect to the account of another person"). Such private managers cannot publicly solicit investments because they are not registered with the S.E.C. and do not qualify for an exemption. *See, e.g.*, 15 U.S.C. § 77c. Further, § 13(f) imposes an affirmative stand-alone disclosure requirement – not a disclaimer to a solicitation.

Section 13(f)(2) authorizes the SEC to "exempt" any "manager or security or class of institutional investment managers or securities" from § 13(f)'s reporting requirements. (App. G at 131a). Section 13(f)(4) provides that the SEC "shall determine" that an exemption is "consistent with the protection of investors and the purposes of this subsection." 15 U.S.C. § 78m(f)(4), (App. G at 132a). But there is no

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[2] The House Conference Report issued one day before Senate passage and three days before House passage of § 13(f) notes that the final law did not contain any relevant differences between the version addressed by the Senate Report. H.R. Conf. Rep. No. 94-229, *reprinted in* 1975 U.S.C.C.A.N. 340.

record that the SEC has ever granted an exemption, based on counsel's review of SEC releases and orders on WESTLAW and the SEC's website. Indeed, the SEC has conceded that it "has not established...procedures for applications under section 13(f)(2)." (SEC § 13(f)(2) Order, (App. B at 19a)). Form 13F's instructions do not even mention § 13(f)(2) or that an exemption is available.

A separate subsection, § 13(f)(3) authorizes the SEC to "delay or prevent public disclosure of...information" in a 13F Report to protect its confidentiality. 15 U.S.C. § 78m(f)(3) (App. G at 131a). Congress determined that "it is in the public interest to grant confidential treatment to an ongoing investment strategy of an investment manager." (App. J at 181a). It found that "[d]isclosure of such strategy would impede competition and could cause increased volatility in the market place." *Id.* Congress "intend[ed]" for the SEC to "normally prevent public disclosure" of an ongoing investment strategy. *Id.*

But applying for § 13(f)(3) confidential treatment requires even greater disclosure than merely filing a 13F Report. Not only must the applicant disclose the standard Form 13F information to the SEC, but he must also provide significant additional information. This includes (a) "[d]escrib[ing] the investment strategy being followed"; (b) "[e]xplain[ing] why public disclosure of the securities would...be likely to reveal the investment strategy"; (c) showing that the investment strategy is ongoing and not public; and (d) showing that public disclosure "would be likely to cause substantial harm to the Manager's competitive position." (Form 13F, App. I at 141a.) SEC Form 13F does not guarantee the confidentiality of this

information. Importantly, a substantial percentage of confidential treatment applications are denied, as an academic study found that 57% of applications submitted by the top ten entities applying were denied, eight of which were hedge funds.[3]

The SEC imposes significant penalties for failing to file Form 13F Reports under Section 13(f) and Rule 13f. This has included imposing a $100,000 civil penalty against Quattro Global Capital, LLC in 2007. SEC Rel. No. 34-56252 (Aug. 15, 2007).

B. Section 13(f) Fails to Advance Legitimate Government Interests

Congress identified two possible interests that Section 13(f) could advance. *First*, Congress speculated that "[i]t would be expected that" the SEC "might use" 13F data "to analyze the characteristics of institutional investment managers, and to analyze the impact of institutional investment managers on the market." (App. J at 173a).

Second, Congress aimed to "stimulate a higher degree of confidence among all investors in the integrity of the securities markets" by making publicly available information as to "the likely market activity and the degree of institutional concentration in [a] security." *Id.* at 172a. In doing so, Congress noted that such information could be valuable precisely

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[3] Vikas Agarwal, Wei Jiang, Yeuhua Tang and Baozhong Yang, *Uncovering Hedge Fund Skill from the Portfolio Holdings They Hide*, Univ. of Cologne Ctr. For Fin. Research, Working Paper No. 10-09, at 38 (Aug. 2010), *available at* http://econstor.eu/bitstream/10419/41384/1/637042085.pdf.

because it revealed opinions about those securities, since it would "suggest that sophisticated investors believe the security is a good investment." *Id.*

But the SEC has repeatedly conceded that § 13(f) has not advanced these purposes, or any other valid regulatory purpose. On September 27, 2010, the SEC's Office of Inspector General issued a scathing report rejecting the SEC's claims *in this case* that it uses § 13(f) information (hereinafter, the "IG Report"). In particular, the IG Report found that:

- "despite the statements" by the Commission "concerning the use of Form 13F information for a variety of oversight and other purposes, the SEC does not, in fact, conduct any continuous or systematic review or analysis of that information." (App. E at 62a (quoting *In re Full Value Advisors LLC*, Rel. 34-61327, App. C at 4 (Jan. 11, 2010)).

- "[D]espite Congressional intent that the SEC would be expected to make extensive use of the Section 13(f) information for regulatory and oversight purposes, no SEC division or office conducts any regular or systematic review of the data." *Id* at 40a.

- "[N]o SEC division or office monitors the Form 13F filings for accuracy." *Id.* at 41a.

- "The SEC performs no review of" the public § 13(f) list of securities. *Id.* at 76a.

Further, the IG Report failed to identify any need for the SEC to have § 13(f) information, while

highlighting alarming defects in the confidentiality process. The IG found that the SEC is missing files for over "one-half" of the confidentiality requests it tested, "rais[ing] concerns that confidential information reported on Form 13F could be inadvertently disclosed." *Id.* at 42a.

Similarly, a 1983 SEC Staff Report prepared by the Commission conceded that "the Commission does not plan to make extensive use of information that could be gathered under Section 13(f) at the present time." Thomas P. Lemke and Gerald T. Lins, *Disclosure of Equity Holdings by Institutional Investment Managers: An Analysis of Section 13(f) of the Securities Exchange Act of 1934,* 43 Bus. Law. 93, 94 & n.8 (1987-1988)(hereinafter "1983 SEC Report"). Instead, the SEC tried to justify § 13(f) as permitting investors to "draw their own conclusions from it and enhancing public confidence in the...markets by enabling the public to assess for itself" details about "institutional managers." *Id.* But it failed to cite any examples, and frankly admitted that "[t]he benefits of Section 13(f) information to the public have not been measured." *Id.*

C. The Impact of Section 13(f) Disclosure on Full Value's Speech

Full Value is the investment advisor to several hedge funds including Full Value Partners L.P., a private investment fund (the "Hedge Fund"), which held equity securities with an aggregate fair market value on March 31, 2006 of more than $100 million. (App. A at 2a). It is a value-oriented activist investor. It seeks to acquire meaningful stakes in publicly traded companies whose stocks it has concluded, after extensive research, are undervalued. It often seeks to

influence management of these companies to take action to increase the stock price. Full Value and its affiliates have participated in more than twenty proxy contests and submitted numerous shareholder proposals under Rule 14a-8 of the 1934 Act. (*Id.*)

Full Value primarily invests in under-followed companies with small market capitalization of less than $300 million. Stock in these companies is relatively illiquid and it can take a long time to accumulate a meaningful position, even when nobody knows that Full Value is buying the stock. When Full Value's stake in a stock is disclosed, the price of the security generally rises because Full Value is known as a catalyst for enhancing shareholder value. (SEC 13(f)(3) Order at 3, App. C at 29a.) In the past, such disclosure occurs after Full Value acquires a 5% or larger position in a target company, which triggers a Form 13D filing because it becomes a threat to control the target company.[4] But § 13(f) requires disclosure of any equity position.

Section 13(f) disclosure threatens to harm Full Value in two significant ways. *First*, it makes it much more difficult and expensive for activist managers like Full Value to acquire a meaningful position in a company. As other investors learn of Full Value's initial position, they will purchase the target company's stock, driving up the stock and increasing

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[4] Section 13(d) of the 1934 Act requires the direct or indirect beneficial owner of more than 5% of a registered equity security to file with the SEC a report, that amongst other things, requires disclosure of whether the purpose of the acquisition of the security is to acquire control of the business or to make a major change in the business or corporate structure.

the costs of Full Value obtaining a significant position. It is well-documented that disclosures of 13F filings drive up stock prices.[5]

Second, § 13(f) disclosure harms Full Value by facilitating an industry of opportunists who "steal" investment strategies disclosed in 13F Reports, by copying the investments, and soliciting investors with discounted fees. This industry is able to charge much lower fees because they have not spent the time, effort and money that Full Value and similar managers have to unearth and develop the actual investment ideas. By "cloning" its investment strategies, these entities can deprive Full Value of asset management fees that it would otherwise earn from investors seeking to access its strategies.

Indeed, the well-known "stealing" and "cloning" industry highlights the significant harm threatened by § 13(f) disclosure. As *Forbes* has written about cloning § 13(f) disclosures to buy the same stocks as the most successful mutual fund advisors, "In this exercise expenses and loads are irrelevant, since you're not buying the funds, just stealing the ideas." C. Hellman, "Pick the Pros," *Forbes* (Jan. 9, 2006).

For example, the investment service "Big Money Watch" advertises as follows:

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[5] *See* C. Henry, "13F Filings Boost Citigroup", Feb. 17, 2010, *available at* http://www.benzinga.com/media/cnbc/131077/13f-filings-boost-citigroup); J. Fink, "13F Filings: Superstar Investors' Buys and Sells," *available at* http://www.investingdaily.com/id/17325/13f-filings-superstar-investors-buys-and-sells.html.

> Here's our system in a nutshell... You know that the "big money" on Wall Street – the top money managers at the nation's largest mutual funds, hedge funds, brokerages, and pension funds...are required by law to file a quarterly "13F" form that discloses their current holdings....[We] [s]elect their top picks...the "best of the best"....and invest only in those stocks for our own Model Portfolio – Big Money Watch (http://www.bigmoneywatch.com).

Another firm, blatantly calling itself "Alpha Clone," has recently launched a hedge fund titled "Activist Masters," which purports to offer investment in "the top holdings of well known activist investors," obtained through the their Section 13(f) disclosures.[6] According to its website, cloning the top holdings of well known activist investors such as Third Point Capital, Steel Partners and Jana Capital, has resulted in returns over the last five years that exceed the S&P 500 index. *See* www.alphaclone.com/strategy_activist_masters.

The "cloning" industry already is targeting Full Value, and thus § 13(f) disclosure will certainly cause more harm. A firm called the "The Value Raider Report," which obtains paid subscribers by reporting investment advice of top managers disclosed through § 13(f) and § 13(d) filings, is already cloning Full Value's investment strategies. A November 22, 2006 Value Raider report focused on three proxy contests

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[6] "*AlphaClone Launches Investable Hedge Fund Equity Strategies-Investors Can Now Easily 'Follow the Smart Money' via the Firm's Investment Accounts,*" *available at* www.marketwire.com/press-release/AlphaClone-LaunchesInvestable-Hedge-Fund-Equity-Strategies-1269585.htm.

waged by Full Value's affiliate, Bulldog Investors, involving closed-end funds. Value Raider suggested that clients buy these securities based on Bulldog's actions. After the report, the discount to NAV[7] of all three closed-end funds decreased significantly, making it more expensive for Bulldog's investors to acquire a larger position.

Aware of how valuable its investment advice is, Full Value goes to great lengths to keep this information confidential. Generally speaking, not even investors in its Hedge Fund are aware of the specific investments.[8] Investors are limited partners in the Hedge Fund, with Full Value acting as the general partner making all investment decisions.

Full Value does not provide a schedule of investments to its investors. Nor does it provide a condensed schedule of such investments in the Hedge Funds' financial statements, even though one is required to obtain an unqualified audit opinion. In its audited financial statements, Full Value advises investors that such "disclosure could reveal proprietary trading strategies and possible targets of shareholder activism..., the confidentiality of which is important to achieve the best results for investors."

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[7] NAV means, "net asset value."

[8] Full Value sometimes discloses some investments to some of the Hedge Fund's investors, but only upon the investor executing a non-disclosure agreement. Full Value has also rarely disclosed an investment to a third party investor holding the same security, but only on a confidential basis.

The threat of harm imposed by § 13(f) disclosure will significantly chill and alter the content of Full Value's speech, *i.e.*, its investment strategies and transactions. In particular, Full Value would need to significantly change its investment program so that its securities holdings will not easily reveal which companies it intends to target for shareholder activism. This may include, among other things, incurring substantial costs to obtain certain holdings to make its underlying activism strategy harder to duplicate. Given the significant effect of § 13(f) disclosure on stock prices, Full Value in some instances could have a fiduciary obligation to its investors do so.

D. Proceedings Below

In letters dated October 24, 2006 and May 8, 2007, Full Value petitioned the SEC for an exemption under § 13(f)(2). Full Value alleged that compelling disclosure of its private activist investment strategy violated the First and Fifth Amendments. Afterwards, upon the urging of SEC staff, Full Value submitted a separate request for confidential treatment under § 13(f)(3).

On January 11, 2010, the SEC issued two separate orders, one denying the § 13(f)(2) exemption application and one denying the § 13(f)(3) request for confidential treatment. *First*, the SEC issued a final denial of the § 13(f)(2) request on its merits, rejecting Full Value's First Amendment argument because it "proceed[ed] on the presumption that section 13(f) is constitutional." (App. B at 22a.) It also declined to address the Fifth Amendment argument, reasoning that Congress intended that a request to protect trade

secrets should be addressed only under § 13(f)(3) "absent extraordinary circumstances." *Id.*

Second, the SEC's separate § 13(f)(3) order rejected confidential treatment, raising for the first time (almost 3 years after Full Value's request) that Full Value had "not identified its Reportable Securities for which it seeks confidential treatment." (SEC § 13(f)(3) Order, App. C at 30a.) Thus, it concluded that Full Value had failed to provide sufficient information to evaluate the request. *Id.*

The court of appeals denied Full Value's petitions for review of both orders on the merits insofar as they raised constitutional challenges to § 13(f) disclosure to the SEC only. It held that "[c]ompelling disclosure to the Commission" was "a rational means" of achieving the goals of § 13(f). (App. A at 13a.) It held that "[m]ere disclosure to the Commission does not raise First Amendment concerns," and applied "rational basis" review. (*Id.* at 15a.) In reaching this decision, it relied on the standard in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) that an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

But rather than address Full Value's First Amendment challenge to § 13(f) in its entirety, the court below took the unusual step of dismissing it as unripe to the extent it challenged § 13(f)'s public disclosure requirement. (App. A at 8a). The court of appeals conceded that this issue was "otherwise 'fit for review'" because it raises a "purely legal question." *Id.* Yet it found the issue unripe based on the conclusion that "the Commission may yet grant Full Value an

exemption under paragraph 13(f)(2)," *id.* which is factually incorrect because there is no dispute that the SEC issued a final decision denying Full Values § 13(f)(2) exemption request on its merits, (App. B at 22a). In addition, the Court of Appeals found that "delaying the constitutional decision" as to public disclosure would "impose no hardship on Full Value" because Full Value could make disclosure to the government and then seek confidential treatment, and seek judicial review of any denial. (App. A at 8a).

In reaching this latter decision, the court of appeals declined to consider the hardship to Full Value's free speech rights, including the right "to refrain from speaking," which is "substantially burden[ed]" at the time one is compelled to speak – here upon disclosure to the government. *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 797 (1988). Nor did it consider that Full Value's speech is chilled when it is compelled to disclose its investment strategy to the government under the threat of public disclosure, since § 13(f) does not guarantee confidentiality.[9]

REASONS FOR GRANTING THE PETITION

Full Value respectfully submits that there are no less than three reasons why the Court should grant its petition of certiorari. *First*, the court of appeals' reliance on the *Zauderer* rational basis standard conflicts with this Court's decision in *Lowe v. S.E.C.*,

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[9] Although the ripeness decision is flawed, the primary basis for this Petition is the Court of Appeals' application of the First Amendment in conflict with the decisions of this Court and several other Circuits.

472 U.S. 181, 210 & n.58 (1985) that "there can be no doubt about" the fully "protected character" of "factual information about past [securities] transactions" as "expression of opinion" about securities. It is well-settled that "compelled speech and compelled silence" are "constitutional[ly] equivalen[t]" in "the context of fully protected speech," and thus triggers strict scrutiny. *E.g.*, *Riley*, 487 U.S. at 797. *Second*, the decision below creates a circuit split with decisions in the Second, Seventh and Tenth Circuits, which have applied *Lowe*, *Riley*, and their progeny to find impersonal investment advice fully protected speech triggering strict scrutiny. *Third*, even if commercial speech-type standards could apply here, the court of appeals' application of the *Zauderer* rational basis test conflicts with the decisions of this Court and the Second and Fifth Circuits holding that *Central Hudson* intermediate scrutiny applies to disclosure requirements like § 13(f) that are not aimed at correcting misleading speech.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AS TO PROTECTED SPEECH

A. The Decision Below Conflicts With This Court's Decisions in *Lowe* and *Riley*

The decision by the court of appeals applying "rational basis" scrutiny to Section 13(f) is directly contrary to this Court's decisions in *Lowe* and *Riley*.

In *Lowe*, this Court held that "expression of opinion about a marketable security" was fully "protected speech." 472 U.S. at 210 & n.58. *Lowe* specifically addressed the level of protection of speech governed by

securities regulation, in that case, the Investment Adviser's Act of 1940 ("1940 Act"). It held that a party providing impersonal investment advice must be given an exemption to the 1940 Act's registration requirements, to avoid violating the First Amendment by placing an improper burden on his protected speech. *Id.* at 210. Notably, *Lowe* specifically applied its holding to the type of speech at issue here, concluding "there can be no doubt" about the fully "protected character" of "*factual information* about past [securities] transactions" in a weekly stock "chart." *Id.* (emphasis added).

Similarly, there can be no doubt about the protected character of the factual information Full Value is required to disclose under § 13(f). Section 13(f) and Form 13F require not just disclosure of holdings on a certain date, but also price, investment discretion, voting authority and other information from which investment strategy can be derived.[10] This information, along with public information about the filer, constitutes investment opinion, as evidenced by the legions of investors who use it to make investment decisions. Indeed, Congress specifically required disclosure of this information because it "suggest[s] that sophisticated investors believe the security is a good investment." (App. J at 172a). Further, the value of this information as investment opinion is evident from the vast industry making a business out of stealing investment ideas from 13F Reports,

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[10] Form 13F requires disclosure of (1) the total amount of each security held; (2) market value; (3) name of issuer, (4) type and class of security; (5) CUSIP number; (6) type of voting authority; and (7) level of investment discretion. (App. I at 150a-55a.)

including firms like "Value Raider," "Alpha Clone" and "Big Money Watch."

In *Riley*, this Court held that laws compelling disclosure of fully protected speech must withstand strict scrutiny. *Riley* struck down a requirement that charitable organizations disclose facts about how donations are used. *Id.* at 795. It held that strict scrutiny applied because the "difference between compelled speech and compelled silence...in the context of protected speech...is without constitutional significance" since the First Amendment protects "the decision of both what to say and what *not* to say." *Id.* It concluded that compelled fact disclosure is suspect "content-based regulation of speech," because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* Applying strict scrutiny, it held that a government "interest in full disclosure" was insufficiently compelling to justify compelling disclosure of protected speech. *Id.* at 798; *accord Vill. of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

Indeed, this Court has consistently applied exacting scrutiny to the compelled disclosure of protected speech. *See, e.g.*, *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759, 2774 (2008); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) (applying strict scrutiny to strike down compelled disclosure of identify of political pamphleteer); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91, (1982) ("The Constitution protects against the compelled disclosure of...beliefs."); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on...the

First Amendment"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251 (1974) (state requirement to publish reply to editorial); *N.A.A.C.P. v. Alabama*, 357 U.S. 462 (1958) (compelled disclosure of membership list). The decision below conflicts with this long line of precedent.

The court of appeals appears to advance two reasons for applying rational basis review – both in conflict with this Court's precedent. *First*, it reasons that "[s]ecurities regulation involves 'a different balance of concerns' and 'calls for different applications of First Amendment principles.' (App. A at 12a (quoting *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting from the dismissal of certiorari).) But this argument is precluded by *Lowe* itself, which applied traditional First Amendment principles to securities regulation, and found that impersonal expression of opinion about securities is fully protected speech. 472 U.S. at 210.

Moreover, this Court's decisions in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), specifically rejected the argument that different First Amendment principles apply where "speech concerns products and services that the government may freely regulate." *Id.* at 512 (holding this argument "is no answer"). This Court held in *44 Liquormart* that government power to extensively regulate or "prohibit an activity" did not give it "the power to suppress speech about it." *Id.* at 511. Rather, traditional First Amendment scrutiny applies. *Id.* at 511-12. Similarly, the decision below conflicts with numerous decisions by this Court holding that traditional First Amendment principles

apply to restrictions on speech in various areas of extensive government regulation.[11]

Second, the decision below appears to suggest that a commercial speech standard should apply, by citing to the *Zauderer* commercial speech case as authority for rational basis review. (App. A at 12a.) But Full Value's speech at issue here cannot be commercial speech because it does not "propose a commercial transaction." *Bd. of Trs. for the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989). It is well-settled that proposing a commercial transaction is "the test for identifying commercial speech." *Id.*; *accord United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (commercial speech "does *no more than* propose a commercial transaction" (emphasis in original)). Indeed, as an unregistered advisor, Full Value is prohibited from soliciting investments from the public – and here proposes only *not* to speak.

Finally, granting the petition is warranted here because Section 13(f) cannot survive the strict scrutiny required by *Riley* and *Lowe*. Section 13(f) is not "narrowly tailored to promote a compelling government interest," *United States v. Playboy Enters.*, 529 U.S. 803, 813 (2000), and cannot overcome exacting scrutiny that makes it deemed "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In particular, this court in *Riley* and several other cases held that the government

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[11] *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (alcohol labeling); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (telecom); *Pacific Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (utilities); *Friedman v. Rogers*, 440 U.S. 1. (1979) (optometry).

"interest in full disclosure" – the main congressional purpose behind Section 13(f) – is insufficient to withstand strict scrutiny of regulation that compels protected speech. *Riley*, 487 U.S. at 798. As this Court held in *McIntyre*, "[t]he simple interest in providing [investors] with additional relevant information does not justify a [government] requirement that a [speaker] make statements or disclosures she would otherwise omit." 514 U.S. at 348. Thus, this "interest of the public in being informed" about institutional investors' securities cannot sustain Section 13(f). *Miami Herald*, 418 U.S. at 251.

Nor can § 13(f) withstand scrutiny based on its purported justification of providing the SEC with more information to assist its regulatory efforts. *Lowe*'s First Amendment analysis of a registration requirement that enabled Commission to monitor securities advice implicitly rejects that interest as insufficient to justify a burden on protected speech. 472 U.S. at 210.

In addition, § 13(f) cannot withstand scrutiny because of the utter lack of evidence that it actually advances any asserted government interest. As the SEC's Inspector General has reported in reference to this case: "despite the statements" by the Commission "concerning the use of Form 13F information for a variety of oversight and other purposes, the SEC does not, in fact, conduct any continuous or systematic review or analysis of that information." IG Report 7-8 (quoting *In re Full Value Advisors LLC*, Rel. 34-61327 at 4 (Jan. 11, 2010)). In addition, "no SEC division or office monitors the Form 13F filings for accuracy and completeness." *Id.* at iv, and "[t]he SEC performs no

review of" the public § 13(f) list of securities, *id.* 15. Indeed, the SEC has previously conceded that it "does not plan to make extensive use of [§ 13(f)] information" and that the "benefits of Section 13(f) information to the public have not been measured."[12]

Moreover, § 13(f) is not narrowly tailored, as the SEC can get substantially similar disclosure through other disclosure mechanisms that actually advance important interests using narrower means. For example, the Market Reform Act of 1990 adopted § 13(h) of the Exchange Act to authorize the SEC to require similar disclosures related to large trading activity to advance "critical" government purposes, including (a) "to assess the nature and cause of a market crisis," (b) "to diagnose developing problems," and (c) "to discover potentially damaging abuses." S. Rep. No. 101-300, at 37, *reprinted at* 1990 WL 259302, at *37. At the same time, § 13(h) uses narrower means by specifically guaranteeing that such § 13(h) information "would be exempt from disclosure" to the public. Large Trader Reporting System, Proposed Rule, 75 Fed. Reg. 21478 (April 23, 2010) (to be codified as 17 C.F.R. §§ 240 and 249); *accord* 15 U.S.C. § 78(h)(7).

Similarly, the SEC in May 2010 proposed Rule 613 to Section 11A of the 1934 Act, which would require Self-Regulatory Organizations ("SROs") and national securities exchanges to file their "audit trails" of

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[12] Thomas P. Lemke and Gerald T. Lins, *Disclosure of Equity Holdings by Institutional Investment Managers: An Analysis of Section 13(f) of the Securities Exchange Act of 1934*, 43 Bus. Law. 93, 94 n.8 (1987-88).

trading activity in a single, uniform format. The audit trails identify every order placed, and must contain details regarding those orders, including customer identifying information, date, time, and material terms. The SEC identified substantial purposes behind creating a central repository of audit trail information, including "to monitor cross-market trading activity", assist in reconstructing markets and investigating potential securities law violations. SEC Rel. No. 34-62174, at 5 (May 26, 2010). Proposed Rule 613 employs narrower means by not compelling investment managers themselves to make disclosures. Further, Proposed Rule 613 also provides that it will "[e]nsure the security and confidentiality of *all information* submitted to the central repository." Proposed Rule 17 C.F.R. § 242.613(e)(4)(i), SEC Rel. No. 34-62174 at 199 (emphasis added).

Notably, neither the legislative history of § 13(h), the SEC release finally proposing a Rule 13(h) in 2010, nor the SEC release proposing Rule 613 identify Section 13(f) when they analyzed other legal tools that the SEC had used to monitor the market impact of institutional trading. *See, e.g.*, 75 Fed. Reg. 21456; SEC Rel. No. 34-62174.

Most recently, the Dodd-Frank Act passed in July 2010 requires private hedge funds and similar investment advisers to make disclosures for the compelling purpose of "the assessment of systemic risk," i.e., risk having an effect on the entire financial system. 15 U.S.C. § 80b-4(b)(1). Again, Congress used a less restrictive approach by requiring that such systemic risk reports "shall" be kept confidential, including specifying that such information would qualify for an exception to FOIA disclosure. 15 U.S.C.

§ 80b-4(b)(7)(B), (8), (9), (10); *see also* 15 U.S.C. § 78x(e).

Thus, the legislative history of § 13(f), its subsequent history, and similar disclosure mechanisms show that § 13(f) is unique among securities disclosure requirements in failing to meaningfully advance a valid regulatory purpose while using more intrusive means.

B. The Decision Below Creates a Circuit Split With the Second, Seventh and Tenth Circuits

The Court should also grant this petition because the decision below conflicts with decisions in the Second, Seventh and Tenth Circuits correctly applying *Lowe* and *Riley* to securities and commodities regulation. Granting the petition would restore uniformity to the application of the First Amendment to securities regulation in the lower courts.

For example, the Seventh Circuit has held that the "First Amendment affords full protection to impersonal investment advice" against regulation by the Commodities Futures Trading Commission. *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 686 (7th Cir. 1998) (hereinafter "CTS I"). In particular, it held that the First Amendment provided full protection for the same type of securities transaction information involved here. The information in *CTS I* included "a number of publications concerning the commodity futures markets," *id.* at 682, some of which merely contained "securities and commodities market charts" or "educational publications concerning markets and

trading." *Id.* These also included stand-alone transaction charts, such as "Futures Chart (Agricultural)," and "Futures Charts (Financial Futures Markets)." *CTS v. CFTC*, No. 97 C 2362, 1999 WL 965962, at *1 (N.D. Ill. Sept. 29, 1999). The court held this information was fully protected speech reflecting expression of opinion about marketable securities under *Lowe*, triggering strict scrutiny of CFTC regulation of such speech. 149 F.3d at 685-86.

Notably, the Seventh Circuit made it clear in a later stage of proceedings that its holding applied to commodities disclosure requirements. It concluded that "[r]egarding CTS's fully protected speech," *i.e.*, impersonal investment opinion, "the government's power to compel speech is 'constitutional[ly] equivalen[t]' to its power to silence speech." *CTS v. CFTC*, 233 F.3d 981, 995 (7th Cir. 2000) (hereinafter *CTS II*) (quoting *Riley*, 487 U.S. at 797). Thus, it required that such disclosure requirements would only survive strict scrutiny if they were "narrowly drawn affirmative disclosures that directly cure fraudulent speech" or another compelling interest, and "no broader than necessary." *Id.* *CTS I* and *CTS II* are thus directly in conflict with the decision below.

Similarly, in *United States v. Wenger*, the Tenth Circuit concluded that heightened scrutiny would be triggered by application of the disclosure requirement in Section 17(b) of the Securities Act of 1933 to "'impersonal' investment advice." 427 F.3d 840, 848 (10th Cir. 2005) (quoting *Lowe*, 472 U.S. at 183). The Court concluded that disinterested "investment advice will still qualify for full First Amendment protection," against securities disclosure requirements. *Id.* at 848. Thus, it found that impersonal investment advice

would trigger a higher level of constitutional review than commercial speech. *Id.*

In addition, the decision below conflicts with the Second Circuit's decision in *CFTC v. Vartuli*, 228 F.3d 94 (2d. Cir. 2000). In *Vartuli*, the Second Circuit held that an injunction applying the Commodities Trading Act to an automatic trading system had to be remanded and limited so it would not apply to purely impersonal investment advice. *Id.* at 112. The injunction barred the creator of an automatic trading system from acting as an advisor without registering with the CFTC. *Id.* The Second Circuit held that the injunction was too broad, because it would apply even if the defendant solely engaged in "constitutionally protected speech," including "conveying information or opinions about the futures markets." *Id.* Thus, it held that the injunction had to be limited to avoid triggering "especially careful judicial scrutiny." *Id.*

Accordingly, the decision below not only conflicts with this Court's First Amendment precedent, it also creates a significant circuit split with the decisions of the Second, Seventh and Tenth Circuits holding that the expression of opinion about securities is protected speech triggering strict scrutiny. Given this significant conflict, the petition should be granted to reconcile the law in this important area.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS APPLYING COMMERCIAL SPEECH STANDARDS

The Court should also grant this petition for the alternative reason that even if commercial speech standards could apply in this case, the decision below conflicts with the decisions of this Court and other Circuits applying intermediate scrutiny to disclosure rules like Section 13(f) that do not involve inherently misleading speech.

In particular, the decision below applied the *Zauderer* "rational basis" standard applicable to commercial speech disclosure requirements aimed at preventing deception in inherently misleading advertisements. (App. A at 12a (citing *Zauderer*, 471 U.S. at 651).) It concluded that compelled disclosure to the S.E.C. under Section 13(f) was a "rational means of achieving" the goals behind Section 13(f). (*Id.*) Applying that standard, it rejected Petitioner's First Amendment claim.

But as this Court has repeatedly held, the *Zauderer* rational basis standard only applies to commercial speech disclosure requirements aimed at "the problem of inherently misleading advertisements." *Milavetz, Gallop & Milavetz v. United States*, 130 S. Ct. 1324, 1340 (2010). In *Milavetz*, the Court made clear that the lower *Zauderer* standard does not apply where the speech at issue is "not inherently misleading and...the State had failed to show that the ...advertisements were themselves likely to mislead consumers." *Id.* Where inherently misleading speech is not at issue, the *Central Hudson* intermediate scrutiny standard

applies. (*Id.* at 1339-40 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).) Indeed, the Court has repeatedly applied intermediate scrutiny to disclosure requirements involving non-misleading commercial speech. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Pacific Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986).[13]

Section 13(f) is not aimed at misleading speech. Rather, it is aimed at two entirely different purposes: (1) enabling the SEC "to analyze the characteristics of institutional investment managers, and to analyze the impact of institutional investment managers on the market," *id.* at 79, 1975 U.S.C.C.A.N. 261; and (2) informing the public about "the likely market activity and the degree of institutional concentration in [a] security." *Id.* at 78, 1975 U.S.C.C.A.N. 260. Thus, the decision below improperly applied the *Zauderer* standard to Section 13(f).

Not surprisingly, the decision below also conflicts with other Circuits. For example, the Second Circuit held that *Central Hudson* intermediate scrutiny – not *Zauderer* – applied to a state law requiring labels disclosing products from cows treated with growth hormone. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996). Like this case, *International Dairy* did not involve any government showing of deceptive commercial speech. *Id.* at 74 ("regulation aimed at preventing deceptive or misleading speech

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[13] *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511-12 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)(alcohol labeling).

would be permissible"). Rather, like this case, the cited government interest in *International Dairy* was "strong consumer interest and the public's right to know." *Id.* at 73. Thus, the court applied *Central Hudson* and struck down the disclosure requirement, reasoning that public interest in full disclosure was "insufficient to permit the State ... to compel the dairy manufacturers to speak against their will." *Id.* at 74.

Similarly, the Fifth Circuit has held that the *Zauderer* standard does not apply where the speech at issue is not "likely to mislead" a consumer. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 166 & n. 59 (5th Cir. 2007). In *Allstate*, the Fifth Circuit applied *Central Hudson* to strike down several advertising statutes, including one requiring an insurance company to affirmatively recommend an impartial auto body shop whenever it recommended one with which it engaged in joint marketing. *Id.* at 164, 167. It held that the *Zauderer* standard would not apply to a disclosure requirement tied to "non-misleading and truthful referrals to a tied body shop." *Id.* at 167. Applying *Central Hudson*, it struck down the disclosure requirement because it did not sufficiently advance an important state interest or do so in a tailored manner. *Id.* at 167-68.

The improper use of the *Zauderer* standard in the decision below is particularly important because Section 13(f) cannot survive *Central Hudson* intermediate scrutiny. Under *Central Hudson*, where, as here, speech is non-misleading and involves lawful activity, the government must show that, (1) regulation promotes a "substantial" government interest; (2) regulation "directly advance[s]" that interest in a material way; and (3) that interest cannot

be served as well by a "more limited restriction on commercial speech." 447 U.S. at 566. "[M]ere speculation or conjecture" about advancing government interests is insufficient, *Rubin*, 514 U.S. at 487, as is evidence of "ineffective or remote support," *Central Hudson*, 447 U.S. at 564. Section 13(f) fails to meet any of these requirements.

First, the government interest of informing investors behind Section 13(f) is not sufficiently substantial to pass the first prong of *Central Hudson*. Absent a well-founded claim that the public is being misled, the mere purpose of informing the public is insufficient. *See Ibanez v. Fla. Bd. of Bus. and Prof. Regulation, Bd. of Accountancy*, 512 U.S. 136, 147-48 (1994). Indeed, the Second Circuit specifically rejected this interest as sufficiently substantial in *International Dairy*. 92 F.3d at 73 (rejecting government interest in "strong consumer interest and the public's right to know"). *Id.* at 73. For similar reasons, the purported interest in the SEC understanding institutional investors and their holdings better is also insufficient.

Second, the SEC cannot meet the *Central Hudson* requirement that the government prove that § 13(f) "directly" and "materially" advances the asserted interest in assisting the SEC in understanding institutional investors. The IG Report has found that the SEC does not review, analyze or monitor Section 13(f) Reports, or otherwise make substantial use of them. (App. E at 40a-41a, 62a.) Further, the SEC has previously admitted that the public benefits of § 13(f) "have not been measured" and that it "does not...make extensive use" of § 13(f) material. 1983 SEC Report, 43 Bus. Law. at 94 n.8. Any suggestion, therefore, that § 13(f) advances government interests is "mere

speculation or conjecture," and insufficient to justify compelling disclosure of Full Value's equity holdings. *Rubin*, 514 U.S. at 487. Further, the most such speculation could support is a showing of insufficient "ineffective or remote support." *Central Hudson*, 447 U.S. at 564; *accord 44 Liquormart*, 517 U.S. at 505 (striking down ban on advertising alcohol prices where "State has presented no evidence to suggest that its speech prohibition will significantly reduce market consumption").

Third, the SEC cannot satisfy the requirement to show that "a more limited restriction" could not advance the government's interests because, as set forth in Section I.A, *supra*, several existing or proposed rules can substantially achieve § 13(f)'s purported interests. These rules are more limited because they either (a) do not compel speech from Full Value, but instead seek it from other sources; and/or (b) guarantee the confidentiality of any information compelled to be disclosed, whereas Section 13(f) merely permits an application for confidentiality treatment, which is very often not granted (thus chilling speech with the threat of public disclosure) and which requires even more intrusive disclosure than Section 13(f) itself.

III. THE DECISION BELOW COMMITS OTHER BASIC LEGAL ERRORS

Although the decision below should be reviewed and reversed based on the fundamental errors set forth above, its ripeness analysis contains additional, important flaws also warranting review.

First, the decision below that the First Amendment challenge to Section 13(f)'s public disclosure requirement is not ripe because "delaying the constitutional decision will impose no hardship on Full Value" (App. A at 8a) conflicts with decisions of this Court and other Circuits holding that allegations of "even minimal impairments" of free speech show "irreparable injury" sufficient for ripeness. *Able v. United States*, 88 F.3d 1280, 1289 (2d Cir. 1996) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The decision below reasoned that since Full Value can seek confidential treatment of its holdings under § 13(f)(3) before they are made public, and after disclosure to the government, it had "not yet suffered any hardship" to its rights from the public "disclosure requirements." (App. A at 8a.) This ignores that compelling Full Value to disclose holdings to the government *itself* imposes a hardship on free speech rights, both by compelling speech and by chilling speech with the real threat of public disclosure since confidential treatment is often denied, without offering administrative review of its First Amendment claim.

In *Able*, the Second Circuit rejected an identical ripeness argument against a First Amendment claim challenging a rebuttable presumption in the U.S. military's "Don't Ask, Don't Tell" policy that openly stating one's homosexuality established a propensity to engage in homosexual acts. 88 F.3d at 1289-90. The government argued that the rebuttable presumption did not impose a sufficient hardship because the military had "not yet definitively applied the policy to the plaintiffs" because "they will have the opportunity to present witnesses and evidence before an administrative board." *Id.* at 1289. *Able* rejected that argument, reasoning that the plaintiffs

"necessarily would be harmed were we to withhold judicial review" because an administrative proceeding would threaten to impose harm to their speech rights without addressing the First Amendment claims. *Id.* at 1289-90. Thus, *Able* held that the plaintiffs' "alleg[ations]" of "a violation of their free speech rights" – even if alleging only a "minimal impairment of this right" – were sufficient to establish ripeness because "if the plaintiffs' constitutional claims have merit, the plaintiffs would suffer...hardship." *Id.* at 1290.

Similarly, the First Circuit rejected the government's argument that a First Amendment claim was unripe because "any misapplication of the [rebuttable] presumption" in violation of free speech rights "can be cured by the availability of administrative review" rendered a First Amendment claim unripe. *Cook v. Gates*, 528 F.3d 42, 71 (1st Cir. 2008). In particular, it held that "the availability of an administrative remedy does not defeat a First Amendment claim that the government is...applying the Act in such a way that it unconstitutionally burdens protected speech." *Id.* The First Circuit noted that the alleged free speech hardships were particularly sufficient to establish a claim because "'[c]onstitutional questions obviously are unsuited to resolution in administrative'" proceedings. *Id.* (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Petitioner has established that its First Amendment challenge to the public disclosure requirements is ripe under *Able* and *Cook*, by alleging the impairment of its free speech rights through compelled disclosure to the SEC. Further, it has shown hardship through the chilling of its speech due

to the real threat of public disclosure since confidential treatment is often denied. As in *Able* and *Cook*, Full Value's ability to seek confidential treatment to avoid the First Amendment issue cannot defeat ripeness because this administrative remedy would not address the merits of Full Value's free speech claim, while threatening the possible public disclosure of Full Value's speech. Indeed, the SEC has already admitted that it will "decline[] to pass" on a First Amendment challenge to Section 13(f) and instead merely "presum[e]" that it is constitutional. (App. B at 22a.) Thus, the Court should grant the Petition to address the conflict between the decision below and the First and Second Circuits.

Second, the court of appeals' First Amendment ripeness decision conflicts with well-established Ninth Circuit precedent that where a constitutional challenge to compelled government disclosure is ripe, a challenge to a related public disclosure requirement is necessarily ripe where both requirements "are part of a unified regulatory scheme." *United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th Cir. 1984) (en banc). *Geophysical* upheld the ripeness of a Fifth Amendment takings challenge to both government and public disclosure requirements under the Outer Continental Shelf Lands Act ("OCSLA"). OCSLA provides that companies would only be offered permits to explore the outer continental shelf upon the condition that they promptly disclose data they obtain to the Secretary of the Interior, who is authorized to publicly disclose such data after 10 years. *Id.* at 695. After receiving demands to disclose to the government, several companies brought suit challenging those demands, and the subsequent public disclosure requirements.

Geophysical held that the "challenges to the [public] disclosure provisions are ripe," even though public disclosure would not occur for several years in the future. *Id.* at 698. In particular, the court held that because the public and government disclosure requirements were "part of a unified regulatory scheme," review of the government disclosure "requirements would not be meaningful if it excluded reference to the [government]'s eventual disposition of the data."[14] *Id.* Further, the court noted that the constitutional claims raised legal questions rendering the challenge to the public disclosure requirements fit for review. *Id.* at 698-699.

As in *Geophysical*, § 13(f)'s requirement to disclose information to the government and its requirement to disclose to the public are "part of a unified regulatory scheme." *Id.* at 698. Indeed, Congress passed both requirements together pursuant to the same statute, providing for government disclosure in § 13(f)(1) and public disclosure "to the public" in § 13(f)(3), while by affirmatively stating that information "shall" be made "conveniently available to the public." Indeed, the legislative history of § 13(f) explicitly states that "rapid dissemination of the institutional disclosure information to the public is a fundamental purpose of the bill," (App. J at 182a), and identified "Public Use" as "[p]erhaps the most important justification" for Section 13(f), (*id.* at 171a). Thus, under *Geophysical*, review of § 13(f)'s government disclosure "requirements would not be meaningful if it excluded

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[14] Like Section 13(f), the OCSLA public disclosure requirement authorizes the government to find that "any data or information is exempt from public disclosure." 30 C.F.R. § 251.14(a)(2).

reference" to the public disclosure requirement. 732 F.2d at 698. Indeed, *Geophysical* illustrates that the First Amendment analysis of § 13(f)'s government disclosure requirement in the decision below is necessarily incomplete for failing to consider the possible ultimate results of such disclosure. Accordingly, the Court should grant the Petition to address the conflict between the decision below and *Geophysical*.

Third, the Court of Appeals' First Amendment ripeness decision is inherently flawed because it relies on the incorrect finding that "the Commission may yet grant Full Value an exemption under paragraph 13(f)(2)." (App. A at 8a.) There is no dispute that the SEC has issued a final denial of Full Value's request for a § 13(f)(2) exemption on the merits, including the First Amendment claim. (App. B at 22a.) This conclusion is particularly dubious given the inability to find a single instance in which the SEC has granted a Section 13(f)(2) exemption. Thus, the decision below conflicts with the bedrock principle that a party is entitled to judicial review of a full and final adverse agency order. *See, e.g.*, 15 U.S.C. § 78y(a)(1); 28 U.S.C. § 2112.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 5, 2011

APPENDIX

APPENDIX

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* Please note that Appendix G reproduces Section 13(f) in its current, updated and renumbered form, whereas the Petition refers to the pre-Dodd-Frank numbering of Section 13(f) to correspond to the decision below. As noted in the decision below (App. A at 2a n.1), on July 22, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act renumbered paragraphs (2), (3), (4), and (5) of Section 13(f) as paragraphs (3), (4), (5), and (6). Thus, please note that references in the Petition to paragraphs 13(f)(2), (3), (4) and (5) correspond, respectively, to paragraphs 13(f)(3), (4), (5), and (6) in Appendix G at 131a-33a.

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1053

Argued October 22, 2010
Decided February 4, 2011

FULL VALUE ADVISORS, LLC,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

On Petition for Review of Orders
of the Securities & Exchange Commission

Douglas R. Hirsch argued the cause for petitioner. With him on the briefs was *Charles H. Dufresne*.

Tracey A. Hardin, Senior Counsel, Securities and Exchange Commission, argued the cause for respondent. With her on the brief were *David M. Becker*, General Counsel, *Jacob H. Stillman*, Solicitor, *Michael A. Conley*, Deputy Solicitor, and *Benjamin L. Schiffrin*, Senior Counsel.

Before: GINSBURG and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

BROWN, *Circuit Judge*: Full Value Advisors, L.L.C. (Full Value or the Fund) is an institutional investment manager, as defined by the Securities and Exchange Act of 1934 (the Act), *see* 15 U.S.C. § 78m(f), subject to the disclosure requirements of section 13(f) of the Act,[1] which applies to institutional investment managers holding at least $100,000,000 in securities.[2] *See id.* § 78m(f)(1). As an "active investing" hedge fund, Full Value seeks to purchase stock in publicly traded companies and to influence management to take actions that increase stock price. In 2006, Full Value accumulated over $100,000,000 in securities holdings.

Full Value challenges the Act's disclosure requirements because they allegedly compel speech in violation of the First Amendment and constitute an uncompensated taking in violation of the Fifth Amendment. According to Full Value, public disclosure of its investment positions would drive up the price of a target company's stock, making it harder for Full Value to acquire a large enough stake in the company

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[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act renumbered paragraphs (2), (3), (4), and (5) of Section 13(f) as paragraphs (3), (4), (5), and (6). Pub. L. No. 111-203, § 929X, 124 Stat. 1376, 1870 (2010). This opinion uses the pre-Dodd-Frank numbering.

[2] Section 13(f)(5)(A) defines "institutional investment manager" as "any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person." 15 U.S.C. § 78m(f)(5)(A).

to pursue proxy contests and effect other changes in corporate management. Public disclosure is not the only injury Full Value anticipates. Full Value also claims disclosure to the Securities and Exchange Commission (the Commission) is unconstitutional. To the extent Full Value seeks to avoid public disclosure, its claims are not ripe. To the extent Full Value seeks to avoid disclosure to the Commission, its claims fail on the merits. Accordingly, we dismiss in part and deny in part Full Value's petition for review.

I

To comply with § 13(f) of the Act, institutional investment managers such as Full Value file quarterly reports—a "Form 13F Report"—with the Commission, disclosing, among other things, the names, shares, and fair market value of the securities over which the institutional managers exercise control. *See* 17 C.F.R. § 240.13f-1(a)(1) (requiring quarterly disclosure on Form 13F); 15 U.S.C. § 78m(f)(1) (2010) (delineating disclosure requirements).

The Commission must make 13F information publicly available unless either of two exemptions applies. First, under paragraph 13(f)(2), "[t]he Commission, by rule, or order, may exempt, conditionally or unconditionally, any institutional investment manager . . . ." 15 U.S.C. § 78m(f)(2); *see also id.* § 78m(f)(4) (requiring subsection 13(f)(2) exemptions to be consistent with the purposes of section 13(f) and the protection of investors). Second, under paragraph 13(f)(3), the Commission "may delay or prevent public disclosure" "as it determines it to be necessary or appropriate in the public interest or for the protection of investors." *Id.* § 78m(f)(3). Managers

seeking a permanent exemption under paragraph 13(f)(2) or temporary confidential treatment under paragraph 13(f)(3) must submit enough information on Form 13F for the Commission to make an informed judgment as to the merits of the request. Letter from Douglas Scheidt, Assoc. Dir. & Chief Counsel, Div. of Inv. Mgmt, SEC to Section 13(f) Confidential Treatment Filers, at 1 (June 17, 1998), *available at* http://www.sec.gov/divisions/investment/guidance/13fpt2.htm (last visited Dec. 12, 2010) [hereinafter Scheidt, SEC Letter]; *see also* 17 C.F.R. § 240.24b-(b)(2)(ii) (requiring "a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act").[3] For example, when seeking temporary confidential treatment, managers must provide a description of their investment strategy and explain why disclosure would be detrimental. *See* SEC Order Denying Full Value's Request for Confidential Treatment, No. 34-61328, at 2 (issued Jan. 11, 2010), 2010 SEC LEXIS 46, at *4–5 (citing Form 13F instructions).

In October 2006, Full Value filed a request for an exemption under paragraph 13(f)(2), asserting its investment positions were trade secrets for which paragraph 13(f)(1) effectuated an unconstitutional taking by providing the Commission discretion to place the information in the public domain. Soon thereafter, Full Value also filed a request for confidential

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[3] Under the regulations and Form 13F instructions, information subject to confidential treatment is nonpublic pending review of the application. *See* Scheidt, SEC Letter at n. 4.

treatment under paragraph 13(f)(3), seeking confidential treatment of all securities "that [it] would otherwise be required to disclose." Rather than provide the requisite Form 13F information, however, Full Value asked "to be excused from complying with certain instructions that are applicable to routine confidential treatment requests." In addition, Full Value claimed the Commission's filing requirements compelled it to speak, in violation of the First Amendment.

On January 11, 2010, the Commission denied both Full Value's request for a paragraph 13(f)(2) exemption and its request for paragraph 13(f)(3) confidential treatment of its investment positions. The Commission held Full Value did not provide the factual support necessary for an informed judgment on the merits of Full Value's confidential treatment request and therefore denied it. The Commission further held "absent extraordinary circumstances" an institutional investment manager may not seek an exemption pursuant to § 13(f)(2) in order to avoid public disclosure of its holdings unless it first seeks in good faith confidential treatment pursuant to § 13(f)(3). As Full Value did not meet that requirement, the Commission also denied Full Value's request for exemption.

Full Value makes two arguments on appeal. First, the Fund argues subsection 13(f) compels speech in violation of the First Amendment. Second, Full Value argues subsection 13(f) constitutes an uncompensated taking in violation of the Fifth Amendment. Full Value alleges each constitutional violation with respect to both public disclosure of its investment position by the Commission and its own preliminary disclosure to the

Commissio Full Value disclaims any challenge to the Commission's interpretation of the Act or any regulation promulgated thereunder. Appellant's Reply Br. 2. Thus, we review Full Value's petition only insofar as it presents constitutional claims.

II

Article III courts, as courts of limited jurisdiction, must first consider whether authority exists to hear a case before moving on to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

The judicial power extends only to a cognizable case or controversy. U.S. CONST. art. III, § 2. Therefore, "article III does not allow a litigant to pursue a cause of action to recover for an injury that is not 'certainly impending,'" *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996)), and courts have developed doctrines to "test the fitness of controversies for judicial resolution," *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996). The ripeness doctrine is one example.

Ripeness, along with the prohibition against advisory opinions, stems from the constitutional case or controversy requirement and "requires us to consider 'the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration.'" *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *see Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102,

138 (1974); *accord Harris v. FAA*, 353 F.3d 1006, 1011–12 (D.C. Cir. 2004). "In determining the fitness of an issue for judicial review [after agency action], we look to see whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). In evaluating hardship, we do not consider "direct hardship, but rather whether *postponing* judicial review would impose an undue burden on [the parties] or would benefit the court." *Harris*, 353 F.3d at 1012 (quotation marks omitted); *accord Bensenville*, 376 F.3d at 1120; *see also AT&T Corp. v. FCC*, 349 F.3d 692, 700 (D.C. Cir. 2003). Because of the prudential considerations which innervate the ripeness doctrine, at times, we "dismiss[] even if there is not a constitutional bar to the exercise of our jurisdiction." *Wyo. Outdoor Council*, 165 F.3d at 48.

A

Full Value claims the public disclosure mandated by § 13(f)(1) compels speech in violation of the First Amendment. This presents a purely legal question and might be otherwise "fit for review." Prudence, however, "restrains courts from hastily intervening into matters that may best be reviewed at another time or in another setting, especially when the uncertain nature of an issue might affect a court's 'ability to decide intelligently.'" *La. Envtl. Action Network*, 87 F.3d at 1382 (citation omitted) (quoting *Am. Trucking Ass'ns v. ICC*, 747 F.2d 787, 790 (D.C. Cir. 1984)). This is especially true when the issue is one of constitutional import. *See Connecticut v. Duncan*, 612 F.3d 107, 114 (2d Cir. 2010). It is not yet certain Full Value will be

required to comply with paragraph 13(f)(1); the Commission may yet grant Full Value an exemption under paragraph 13(f)(2). If Full Value does not have to comply with 13(f)(1), the constitutional issue will not have to be resolved. *Cf. Hayburn's Case,* 2 U.S. (2 Dall.) 408 (1792) (declining to issue an advisory opinion).

Moreover, delaying the constitutional decision will impose no hardship on Full Value. So far, Full Value has filed only an application for exemption under paragraph 13(f)(2) and a request for confidential treatment under paragraph 13(f)(3). Because those filings did not reveal investment positions, the Commission has not yet produced a 13(f)(1) report. Hence, Full Value's allegedly proprietary information has not been disclosed publicly, and Full Value has not yet suffered any hardship as a result of the Act's disclosure requirements. Full Value may avoid public disclosure of its holdings in the future by submitting the requisite information and obtaining confidential treatment or, thereafter, an exemption from the reporting requirements. When and if relief is denied, Full Value will be able to seek judicial review of the Commission's decision before its filings are made public. *See La. Envtl. Action Network*, 87 F.3d at 1381. In sum, Full Value's First Amendment claim satisfies neither condition for ripeness and we will not consider it at this time. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 585–87 (D.C. Cir. 2007).

B

Full Value's Fifth Amendment claim is not ripe either. As we have seen, Full Value might avoid the harm it alleges will follow inevitably from public

disclosure of its investment positions, and avoid the regulatory taking it argues paragraph 13(f)(1) effects, if it obtains confidential treatment or an exemption. A claim is not ripe where the "possibility that further consideration will actually occur before [implementation] is not theoretical, but real." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998); *see Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190–91 (1985). Here, the Commission is free to consider whether Full Value's investment positions constitute a trade secret or other cognizable property interest under the Fifth Amendment before disclosing the information to the public. Indeed, the paragraph 13(f)(3) confidential treatment process, and the procedures established by the Commission thereunder, specifically contemplate further evaluation. *See* 17 C.F.R. § 240.24b-2(b)(2). Full Value's takings claim cannot possibly be in a "concrete and final form," *Eagle-Picher Indus., Inc. v. U.S. EPA.*, 759 F.2d 905, 915 (D.C. Cir. 1985), unless and until the Commission denies the Fund's satisfactorily detailed request and threatens public disclosure of its purported property. Only at that juncture will Full Value's claims become ripe for review.

C

Before proceeding to the merits, we pause to consider the intersection between the ripeness and exhaustion doctrines in this case. As stated above, ripeness concerns the fitness of issues for review. Exhaustion, on the other hand, focuses on process—in particular, the process a litigant must go through at the agency level to ensure the agency has ample opportunity to "crystallize[] its policy before that policy

is subjected to judicial review." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. Cir. 1987). At times, we have described these two doctrines as both "analytically distinct," *Unity08 v. F.E.C.*, 596 F.3d 861, 865 (D.C. Cir. 2010), and yet "difficult to distinguish," *John Doe, Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 567 (D.C. Cir. 2007), or "complementary." *Ticor Title Ins. Co.*, 814 F.2d at 735. Our inconsistent description underscores the simple fact that in certain contexts the two doctrines remain distinct, and in others they blend together. Full Value arguably exhausted its claim in this case by filing requests for an exemption under paragraph 13(f)(2) and confidential treatment under paragraph 13(f)(3). But the company complied with the form of the exemption rather than its substance. The agency had no more opportunity to "crystallize its policy" than had Full Value proceeded directly to this Court. So, did Full Value fail to exhaust or are its claims simply unripe? We need not finally decide. Full Value's failure to fully comply with the Commission's process (i.e. exhaust) has left some of its claims unfit for review (i.e. unripe) and that is perhaps not surprising given the two doctrines' common origins; they are both "prudential doctrines" designed to "respond to pragmatic concerns about the relationship between courts and agencies." *John Doe, Inc.*, 484 F.3d at 567.

III

A

Full Value views its inability to control what the Commission does with investment information divulged in the course of an application for confidential treatment or an exemption request as a form of

compelled speech. If the Commission determines the information is not entitled to confidential treatment or Full Value does not qualify for an exemption, the Commission is required to publicly disclose it. 15 U.S.C. S 78m(f)(3).

The freedom of thought protected by the First Amendment against state action "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). First Amendment concerns are paramount when the Government compels a speaker to endorse a position contrary to his beliefs, or to "affirm[] a belief and an attitude of mind" he opposes. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (requiring schoolchildren to salute the flag is unconstitutional); *see also, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Ca.*, 475 U.S. 1, 20 (1986) (requiring a utility company to distribute a third party's newsletter in its own billing envelopes is unconstitutional); *Wooley*, 430 U.S. at 705, 717 (requiring a citizen to display the state motto is unconstitutional); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (requiring newspapers to publish replies from political candidates is unconstitutional). First Amendment concerns may even be present when the state compels speech in a content-neutral manner. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.") (citation omitted); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 188 (3d Cir. 2005).

The disclosure required under paragraphs 13(f)(2) and 13(f)(3) does not raise the same constitutional concerns. Here the Commission—not the public—is Full Value's only audience. The Act is an effort to regulate complex securities markets, inspire confidence in those markets, and protect proprietary information in the process. It is not a veiled attempt to "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad.*, 512 U.S. at 641. In this respect, paragraphs 13(f)(2) and 13(f)(3) are indistinguishable from other underlying and oft unnoticed forms of disclosure the Government requires for its "essential operations." *W. Va. Bd. of Educ.*, 319 U.S. at 645 (Murphy, J., concurring) (rejecting First Amendment claim when "essential operations of government may require [disclosure] for the preservation of an orderly society,—as in the case of compulsion to give evidence in court.") For example, without violating the First Amendment, the Government requires individuals to submit income tax information to the IRS. *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (First Amendment is not implicated by requirement of disclosure to IRS that entails no public dissemination of a political or ideological message).

Securities regulation involves "a different balance of concerns" and "calls for different applications of First Amendment principles." *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting from the dismissal of certiorari as improvidently granted) (noting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of

information about securities . . . ."). This principle applies *a fortiori* when disclosure is to the Commission alone. Congress enacted paragraphs 13(f)(2) and 13(f)(3) to protect an institutional investor's confidential information when doing so is warranted. Compelling disclosure to the Commission alone so the Commission may determine whether confidential treatment is warranted is a rational means of achieving that goal. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (rejecting argument that disclosure requirements are subject to a "strict 'least restrictive means' analysis"); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (describing the applicable constitutional scrutiny for government disclosure as "akin to the general rational basis test governing all government regulations under the Due Process Clause").

B

In a similar vein, Full Value argues disclosure to the Commission is an unconstitutional taking. The Fifth Amendment prohibits the taking of private property for public use without just compensation. U.S. CONST. amend. V. A "regulatory taking" is one in which a government regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). To constitute a regulatory taking, the Government action must (1) affect a property interest and (2) go "too far" in so doing (i.e. amount to a deprivation of all or most economic use or a permanent physical invasion of property). *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1000–01, 1005 (1984). In determining how far is too far, we consider several factors, including "the character of the governmental

action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 1005 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)).

Even if we assume the compilation of Full Value's securities holdings constitutes a property interest, disclosure to the Commission does not constitute a taking because the regulations requiring disclosure do not go "too far." First, paragraphs 13(f)(2) and 13(f)(3) have a legitimate public purpose—to promote competition and decrease volatility in the markets, and to mitigate the potential harm in doing so by "grant[ing] confidential treatment to an ongoing investment strategy of an investment manager." S. Rep. No. 94-75, at 87 (April 14, 1975). Second, disclosure to the Commission produces no economic harm. The Commission ensures that sensitive information submitted pursuant to paragraph 13(f)(2) or paragraph 13(f)(3), such as trade secrets, remains confidential, and the value of a trade secret is not destroyed if it is disclosed to a party that is under obligation to protect it. *Cf. Ruckleshaus*, 467 U.S. at 1002 ("[I]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information . . . his property right is extinguished."). Lastly, because paragraphs 13(f)(2) and 13(f)(3) were in effect before Full Value reached the $100,000,000 statutory threshold triggering its paragraph 13(f)(1) disclosure requirement, Full Value could not have reasonable investment-backed expectations. *See Rowe*, 429 F.3d 294, 315 (1st Cir. 2005) (no reasonable expectation because disclosure statute's effective date predated contract); *cf. Phillip Morris, Inc. v. Reilly*, 312 F.3d 24, 39–41 (1st Cir.

2002) (reasonable expectation because no prior regulation).

IV

To the extent Full Value's claims rest on potential public disclosures of its investment positions, they are not ripe. Full Value will not have to disclose its positions to the public if the Commission grants an exemption or provides confidential treatment. Of course, for the Commission to properly consider Full Value's confidential treatment and exemption requests, Full Value must provide the Commission with sufficient information to make an informed judgment. Mere disclosure to the Commission does not raise First Amendment concerns. Paragraphs 13(f)(2) and 13(f)(3) have a rational basis and do not require Full Value to endorse or acknowledge positions that are anathema to its managers. There is no public audience Full Value must address. Nor does disclosure to the Commission raise Fifth Amendment concerns under *Ruckleshaus* even assuming Full Value has a cognizable property interest in knowledge of its investment positions.

So ordered.

APPENDIX B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61327 / January 11, 2010

In the Matter of	)
Full Value Advisors, LLC	)
	)

ORDER PURSUANT TO SECTIONS 13(f)(2), 13(f)(4) AND 36 OF THE SECURITIES EXCHANGE ACT OF 1934 DENYING APPLICATION FOR EXEMPTION FROM RULE 13f-1 UNDER THE SECURITIES EXCHANGE ACT OF 1934

Full Value Advisors, LLC ("Full Value"), a Delaware limited liability company and an investment adviser to certain private investment companies, filed an application on October 24, 2006, pursuant to section 13(f)(2) of the Securities Exchange Act of 1934 ("Exchange Act") seeking an exemption from rule 13f-1 under the Exchange Act ("Exemptive Application"). By letters dated February 7, 2007 and May 8, 2007, Full Value submitted written requests ("February CT Request" and "May CT Request," respectively, and together, "Full Value CT Requests") pursuant to section 13(f)(3) of the Exchange Act and rule 24b-2 under the Exchange Act seeking confidential treatment of information that Full Value otherwise

was required to disclose on Forms 13F for the quarters ending December 31, 2006 and March 31, 2007, respectively.[1] The May CT Request also set forth "an additional but related constitutional argument for exemptive relief that [Full Value was] unaware of when [Full Value] submitted the Exemptive Application" ("Additional Argument"). The Exemptive Application and the Full Value CT Requests did not identify Full Value's Reportable Securities.

The Commission has considered the Exemptive Application, including the Additional Argument. The Commission finds that the standard for an exemption from section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder, set forth in section 13(f)(4) of the Exchange Act, has not been met. Separately, the Commission is issuing an order denying the Full Value CT Requests ("CT Denial Order") for failure to provide the factual support necessary for the Commission to make an informed judgment as to the merits of the CT Requests.

Background

Section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder require every "institutional investment manager," as defined in section 13(f)(5)(A) of the Exchange Act, that exercises investment discretion with respect to "section 13(f) securities," as defined in rule 13f-1, having an aggregate fair market value of at least $100 million ("Institutional Manager," and the securities, "Reportable Securities"), to file with the

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[1] Full Value also submitted a letter, dated February 13, 2008, correcting a statement in the February CT Request.

Commission quarterly reports on Form 13F setting forth each Reportable Security's name, CUSIP number, the number of shares held, and the market value of the position. Form 13F must be filed within 45 days of the end of the calendar year during which the $100 million threshold was satisfied and within 45 days of the end of the first three calendar quarters that follow.

Congress enacted section 13(f) in order to make publicly available information about Institutional Managers' holdings of Reportable Securities, and to create with the Commission a central depository of historical and current data about these holdings.[2] The legislative history of section 13(f) suggests that the provision was designed to further regulatory and policymaking uses of the information, as well as to contribute to the transparency and integrity of, and investor confidence in, the U.S. equity markets.[3]

Under section 13(f)(3) of the Exchange Act, information filed on Form 13F must be made publicly available, "except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with [the Freedom of Information Act]." Rule 200.80(b)(4) of the Commission's Freedom of Information Act rules provides that the Commission generally will not publish or make available to any

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[2] *See* Report of Senate Comm. On Banking, Housing and Urban Affairs, S.Rep.No. 75, 94th Cong., 1st Sess. 83 (1975) at 79-82, 85-87.

[3] *See id.* at 80-84.

person matters that "[d]isclose trade secrets and commercial or financial information obtained from a person and privileged or confidential." An Institutional Manager seeking to delay or prevent public disclosure of any such information provided on Form 13F must submit a written confidential treatment request ("CT Request") following the procedures set forth in rule 24b-2 under the Exchange Act and the Commission's Instructions to Form 13F ("Instructions").

Under section 13(f)(2) of the Exchange Act, in relevant part, the Commission may by order exempt an Institutional Manager from section 13(f)(1) of the Exchange Act or the rules thereunder. Pursuant to Section 13(f)(4) of the Exchange Act, the Commission must determine that any such exemption is consistent with the protection of investors and the purposes of section 13(f). Under section 36 of the Exchange Act, in relevant part, the Commission may by order exempt any person from any provision of the Exchange Act or any rule or regulation thereunder. Rule 0-12 under the Exchange Act sets forth Commission procedures for applications for orders under section 36 of the Exchange Act. The Commission has not established separate procedures for applications under section 13(f)(2), and therefore follows the procedures set forth in rule 0-12 for issuing this order.

The Exemptive Application

Full Value came under the definition of Institutional Manager in March 2006, and was required to file Forms 13F beginning with calendar quarter ended December 31, 2006. In October 2006, Full Value filed the Exemptive Application seeking an exemption from rule 13f-1 pursuant to section 13(f)(2).

On February 8, 2007 and May 10, 2007, Full Value submitted the February CT Request and the May CT Request, respectively.

The Exemptive Application stated that Full Value was an activist investor that "seek[s] to acquire meaningful stakes in publicly-traded companies whose stocks [it has] concluded, after extensive research, are undervalued and to influence management to take action to increase the stock prices." The Exemptive Application further stated that "[t]he Applicants generally do not publicly disclose their investments" and "[t]he Applicants' equity holdings are trade secrets that are protected by the Taking Clause of the Fifth Amendment [to the Constitution]" ("Fifth Amendment Argument"). The Exemptive Application argued that "the investors in an entity advised by the Applicants may be harmed if the Applicants' trade secrets are accessed by other investors with whom it competes." The Exemptive Application also argued that "unless an exemption from rule 13f-1 is granted, the Applicants' trade secrets will be taken for public use without compensation in violation of the Fifth Amendment."[4]

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[4] The February CT Request stated that "If the order requested in the Exemptive Application is denied we would likely seek a judicial determination that [section] 13(f) is unconstitutional. In light of these novel circumstances, we request to be excused from complying with certain instructions that are applicable to routine confidential treatment requests made pursuant to section 13(f)(3) and rule 24b-2." By telephone conversation and a letter, dated March 9, 2007, which attached the Instructions, Form 13F, and a staff letter to Institutional Managers, dated June 17, 1998, providing guidance on the CT Request process, the staff informed Full Value about the requirements applicable to CT Requests.

The May CT Request stated "[p]lease be advised that there is an additional but related constitutional argument for exemptive relief that we were unaware of when we submitted the Exemptive Application. Involuntary compliance with the filing requirement of rule 13f-1 constitutes 'compelled speech.' A regulation that compels commercial speech must pass a four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Com'r*, 447 U.S. 557, 562-63 (1980) . . ." The May CT Request went on to argue that the two Congressional purposes behind section 13(f) -- that the collected information find regulatory or policy uses and contribute to public confidence in the U.S. securities markets -- have not been fulfilled, and that section 13(f)(1) therefore violates the First Amendment to the Constitution.

The Commission's Findings

The Commission has considered the Fifth Amendment Argument set forth in the Exemptive Application. We note that Congress, in section 13(f)(3) of the Exchange Act, specifically provided protection from public disclosure for an Institutional Manager's trade secrets and similar sensitive business information. The Commission has established an administrative process, detailed in rule 24b-2 under the Exchange Act and the Instructions, for Institutional Managers to submit CT Requests to protect such information from public disclosure. The CT Request process is tailored to protect certain specific information upon a demonstration of substantial harm, while ensuring that other information required by Form 13F is publicly disclosed consistent with section 13(f)(1). We do not believe that Congress generally intended for the Commission to

exempt an Institutional Manager from disclosing its Reportable Securities pursuant to section 13(f)(2) when the Commission's authority to delay or prevent public disclosure of certain Reportable Securities pursuant to section 13(f)(3) can adequately protect the proprietary interests of an Institutional Manager. Therefore, absent extraordinary circumstances, an Institutional Manager seeking protection on grounds provided for under section 13(f)(3) must make a good faith effort to obtain that protection through the CT Request process. Because the Fifth Amendment Argument in the Exemptive Application seeks to protect from public disclosure information that is trade secrets, such protection is more properly addressed pursuant to the CT Request process. Full Value's failure to provide the factual support necessary for the Commission to make an informed judgment as to the merits of its CT Requests is addressed separately in the CT Denial Order.

The Commission also has considered the Additional Argument alleging that section 13(f) violates the First Amendment to the Constitution. The Additional Argument is a type of facial challenge to the constitutionality of a law administered by the Commission upon which the Commission generally declines to pass. Therefore, the Commission proceeds on the presumption that section 13(f) is constitutional.

The Commission also disagrees with the assertion in the Exemptive Application and the Additional Argument that the information collected pursuant to section 13(f) has not been used for the purposes intended by Congress. The information collected on Forms 13F has been and continues to be used by U.S. regulators, academics, the media and financial

information distributors, and investors and other U.S. equity markets participants, as intended by Congress. The Commission's staff use Form 13F information for a variety of research, oversight, and enforcement purposes. The Commission's staff also use Form 13F-based academic research, for example, to analyze the Commission's rulemaking initiatives under the federal securities laws.[5] As the primary source of data about institutional equity holdings, Form 13F information is monitored, analyzed, and distributed by market data services for use by investors and other participants in the U.S. equity markets. The information reported on Form 13F can be used for commercial and academic purposes, for example, to identify and locate large holders of an issuer's publicly-traded stock, measure investment performance, and characterize trading patterns. We believe that the availability of information provided on Forms 13F to the public has contributed to the transparency and integrity of the U.S. equity markets and thereby to investor confidence, as intended by Congress.

Having considered the Exemptive Application and the Additional Argument, the Commission finds that Full Value has failed to demonstrate that exempting it from rule 13f-1 under the Exchange Act would be

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[5] Form 13F information from an Institutional Manager that is a bank whose deposits are insured under the Federal Deposit Insurance Act also is required to be filed, for example, with the Federal Reserve Board and the Office of the Comptroller of the Currency. *See* section 13(f)(4) of the Exchange Act (requiring such Institutional Manager to file a copy of its Form 13F with the "appropriate regulatory agency"). *See also* section 3(a)(34)(D) of the Exchange Act (defining the "appropriate regulatory agency").

consistent with the protection of investors and the purposes of section 13(f), as required by section 13(f)(4).

Accordingly, IT IS ORDERED, pursuant to sections 13(f)(2), 13(f)(4) and 36 of the Exchange Act, that Full Value's Exemptive Application is denied.

By the Commission.

/s/ Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

APPENDIX C

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61328 / January 11, 2010

In the Matter of	)
Full Value Advisors, LLC	)
	)

ORDER PURSUANT TO SECTIONS 13(f)(3) and 13(f)(4) OF THE SECURITIES EXCHANGE ACT OF 1934 DENYING REQUESTS FOR CONFIDENTIAL TREATMENT OF INFORMATION REQUIRED TO BE FILED PURSUANT TO SECTION 13(f)(1) OF THE SECURITIES ECHANGE ACT OF 1934

Full Value Advisors, LLC ("Full Value") is a Delaware limited liability company and an investment adviser to certain private investment companies. By letters dated February 7, 2007 and May 8, 2007, Full Value submitted written requests ("February CT Request" and "May CT Request," respectively, and together, "Full Value CT Requests") pursuant to section 13(f)(3) of the Securities Exchange Act ("Exchange Act") and rule 24b-2 under the Exchange Act seeking confidential treatment of information that Full Value otherwise was required to disclose on Forms 13F pursuant to section 13(f)(1) of the Exchange

Act and rule 13f-1 thereunder for the quarters ending December 31, 2006 and March 31, 2007.[1]

The Commission has considered the Full Value CT Requests. The Commission deems it appropriate in the public interest and for the protection of investors pursuant to sections 13(f)(3) and 13(f)(4) of the Exchange Act to deny the Full Value CT Requests.

Background

Section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder require every "institutional investment manager," as defined in section 13(f)(5)(A) of the Exchange Act, that exercises investment discretion with respect to "section 13(f) securities," as defined in rule 13f-1, having an aggregate fair market value of at least $100 million ("Institutional Manager," and the securities, "Reportable Securities"), to file with the Commission quarterly reports on Form 13F setting forth each Reportable Security's name, CUSIP number, the number of shares held, and the market value of the position. Form 13F must be filed within 45 days of the end of the calendar year during which the $100 million threshold was satisfied and within 45 days of the end of the first three calendar quarters that follow.

Under section 13(f)(3) of the Exchange Act, information filed on Form 13F must be made publicly available, "except that the Commission, as it determines to be necessary or appropriate in the public

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[1] Full Value also submitted a letter, dated February 13, 2008, correcting a statement in the February CT Request.

interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with [the Freedom of Information Act]." Under section 13(f)(4), "[i]n exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets."

Rule 200.80(b)(4) of the Commission's Freedom of Information Act rules provides that the Commission generally will not publish or make available to any person matters that "[d]isclose trade secrets and commercial or financial information obtained from a person and privileged or confidential." An Institutional Manager seeking to delay or prevent public disclosure of any such information provided on Form 13F must submit a written confidential treatment request following the procedures set forth in rule 24b-2 under the Exchange Act and the Commission's Instructions to Form 13F ("Instructions").

Rule 24b-2(b)(2)(ii) under the Exchange Act requires that a request for confidential treatment of Form 13F information contain, among other things, "a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act." Rule 24b-2(b)(2)(ii) also requires that a request for confidential treatment of Form 13F information contain "a justification of the period of time for which confidential treatment is sought."

The Instructions state that an Institutional Manager "requesting confidential treatment must provide enough factual support for its request to enable the Commission to make an informed judgment as to the merits of the request" and must "address all pertinent factors." The Instructions also require that a request based on a claim that the subject information is confidential commercial or financial information must provide supporting information in five specific areas: (1) a description of the investment strategy, including the extent of any program of acquisition or disposition; (2) an explanation of why disclosure of the securities would be likely to reveal the strategy; (3) a demonstration that the revelation of the investment strategy would be premature; (4) a demonstration that failure to grant the request for confidential treatment would be likely to cause substantial harm to the Institutional Manager's competitive position; and (5) a statement of the period of time for which confidential treatment is requested. The Instructions also provide that an Institutional Manager may discuss each of the five areas listed above with respect to a class of holdings rather than with respect to each individual holding if the Institutional Manager "can identify a class or classes of holdings as to which the nature of the factual circumstances and the legal analysis are substantially the same."

Full Value CT Requests

Full Value came under the definition of Institutional Manager in March 2006, and was required to file Forms 13F beginning with calendar quarter ended December 31, 2006. On October 24, 2006, Full Value filed an application pursuant to section 13(f)(2) of the Exchange Act seeking an

exemption from rule 13f-1 under the Exchange Act ("Exemptive Application"). On February 8, 2007 and May 10, 2007, Full Value submitted the February CT Request and the May CT Request, respectively. The Exemptive Application and the Full Value CT Requests do not identify Full Value's Reportable Securities. The Full Value CT Requests request confidential treatment "until our administrative remedies have been exhausted with respect to the Exemptive Application."

The February CT Request states that Full Value "are activist investors. We seek to acquire meaningful stakes in small publicly traded companies that we have concluded, after extensive research, are undervalued and to take action to increase their stock price." The February CT Request further states that if Full Value "are required to prematurely disclose our [Reportable Securities], it is likely that their prices will rise due to the expectation by investors that we may act sooner or later to unlock their value. Such price increases may be harmful to our clients because they might otherwise have been able to acquire additional shares of their stocks at lower prices." The February CT Request "incorporate[d] the Exemptive Application." According to the February CT Request, the Exemptive Application "essentially argues that our [Reportable Securities] are trade secrets and that involuntary compliance with the filing requirement of rule 13f-1 would, by requiring us to publicly disclose them, constitute a 'taking' of our trade secrets without just compensation in violation of the Fifth Amendment to the Constitution."

The May CT Request "incorporate[d] the Exemptive Application as well as the February [CT Request]." The

May CT Request also discussed "an additional but related constitutional argument for exemptive relief that we were unaware of when we submitted the Exemptive Application. Involuntary compliance with the filing requirement of rule 13f-1 constitutes 'compelled speech.'"

The Commission's Findings

We have carefully reviewed the Full Value CT Requests. Full Value has not identified the Reportable Securities for which it seeks confidential treatment and otherwise failed to provide the factual and analytical support necessary for the Commission to make an informed judgment as to the merits of the Full Value CT Requests. Full Value has failed to address both the status and the expected duration of its purported acquisition program in the Reportable Securities as required by rule 24b-2 and the Instructions. Full Value has not provided sufficient facts or analysis about its Reportable Securities to demonstrate that disclosure of its position in any Reportable Security would likely cause substantial harm to Full Value's competitive position. Full Value also has failed to justify any period of confidential treatment, as required by the Instructions.

Accordingly, IT IS ORDERED that, pursuant to sections 13(f)(3) and 13(f)(4) of the Exchange Act, the Full Value CT Requests are denied.

By the Commission.

/s/ Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

APPENDIX D

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61366 / January 15, 2010

In the Matter of	)
Full Value Advisors, LLC	)
	)

STAY ORDER

On January 11, 2010, the Commission issued an order denying an application filed by Full Value Advisors, LLC ("Full Value"), a Delaware limited liability company and an investment adviser to certain private investment companies.[1] Full Value's application, which it filed on October 24, 2006 pursuant to Section 13(f)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), sought an exemption from Rule 13f-1 under the Exchange Act ("Exemptive Application"). On January 11, 2010, the Commission also issued a separate order denying two written requests made by Full Value pursuant to Section 13(f)(3) of the Exchange Act and Rule 24b-2 thereunder seeking confidential treatment of

[1] *Full Value Advisors, LLC*, Securities Exchange Act Rel. No. 61327 (Jan. 11, 2010), ___ SEC Docket ___.

information that Full Value otherwise was required to disclose on Forms 13F for the quarters ended December 31, 2006 and March 31, 2007, respectively (collectively, "CT Requests").[2]

We understand Full Value may file a petition for review. Therefore, it appears appropriate under the circumstances to grant a stay of the Commission's orders that deny Full Value's Exemptive Application and CT Requests for sixty days or, should Full Value file a timely appeal in a Court of Appeals specified in Section 25 of the Exchange Act, pending determination of that appeal.

Accordingly, it is ORDERED that the Commission's January 11, 2010 order denying Full Value's Exemptive Application be, and it hereby is, stayed for sixty (60) days from January 11, 2010; and it is further

ORDERED that, if Full Value files a timely appeal with an appropriate Court of Appeals, the stay of the denial of Full Value's Exemptive Application and CT Requests shall continue pending the determination of that appeal by such Court of Appeals.

By the Commission.

/s/ Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

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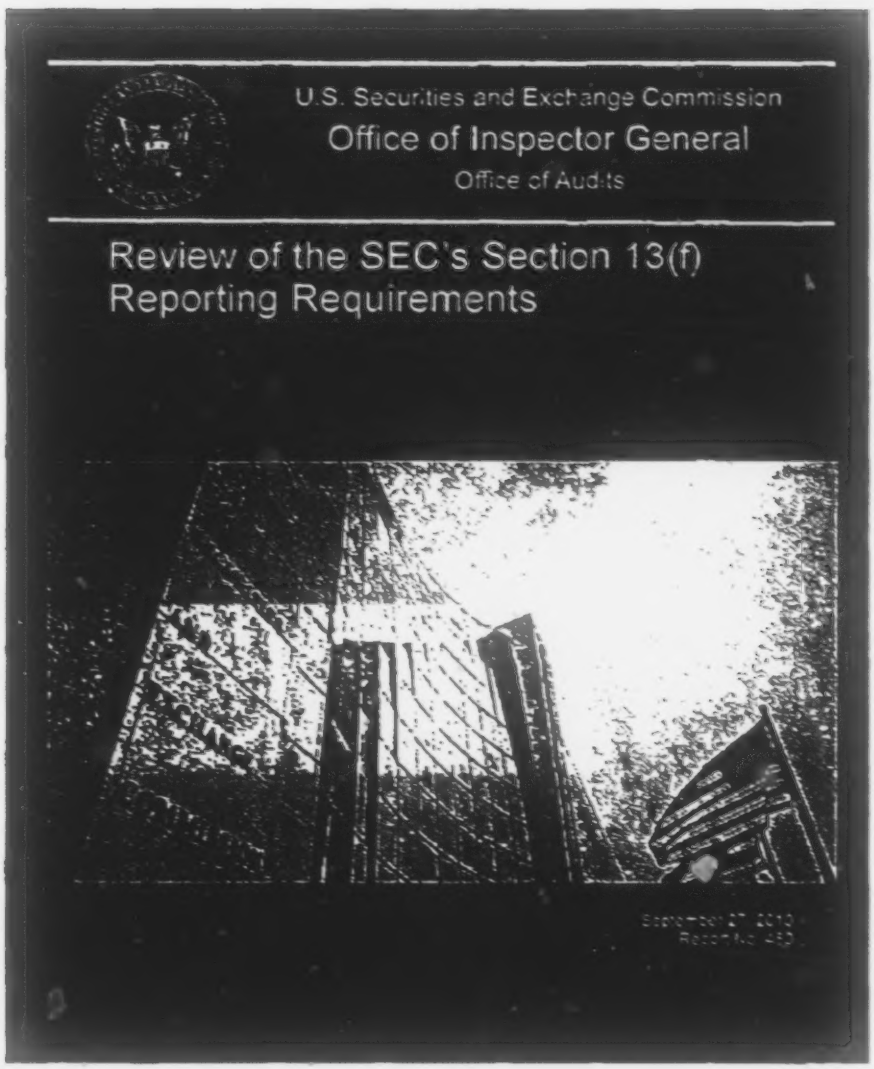
[2] *Full Value Advisors, LLC*, Exchange Act Rel. No. 61328 (Jan. 11, 2010), ___ SEC Docket ___. Under Form 13F Confidential Treatment Instruction 4, Full Value must disclose the holdings information required on Form 13F within six business days of notification of the Commission's denial of the CT Requests.

APPENDIX E



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OFFICE OF
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION
WASHINGTON, D.C. 20549

MEMORANDUM

September 27, 2010

To: Mary Schapiro, Chairman
Andrew J. Donohue, Director, Division of Investment Management
Henry Hu, Director, Division of Risk, Strategy, and Financial Innovation
Sharon Sheehan, Associate Executive Director, Office of Administrative Services
Jeffery Heslop, Chief Operating Officer, Office of the Chief Operating Officer
Barry D. Walters, Chief FOIA/PA Officer, Office of FOIA and Records Management Services
David Becker, General Counsel, Office of the General Counsel
Ethiopis Tafara, Director, Office of International Affairs

From: H. David Kotz, Inspector General, Office of Inspector General [/s/ HDK]

Subject: *Review of the SEC's Section 13(f) Reporting Requirements,* Report No. 480

This memorandum transmits the U.S. Securities and Exchange Commission Office of Inspector General's (OIG) final report detailing the results of our review of

Section 13(f) reporting requirements. The review was conducted by the OIG as part of our continuous efforts to assess management of the Commission's programs and operations and was based on our audit plan.

This report contains 12 recommendations that were developed to strengthen the SEC's oversight of Section 13(f) reporting. The Chairman's Office and all Office and Division Directors fully concurred with the recommendations pertaining to its Office or Division. The Office of Information Technology, Office of the General Counsel, Office of International Affairs, and the Office of FOIA and Records Management Services did not provide OIG with written comments. The written responses OIG received to the draft report are included in its entirety in Appendix V.

Within the next 45 days, please provide the OIG with a written corrective action plan that is designed to address the agreed-upon recommendations. The corrective action plan should include information such as the responsible official/point of contact, time frames for completing the required actions, and milestones identifying how you will address the recommendations cited in this report.

Should you have any questions regarding this report, please do not hesitate to contact me. We appreciate the courtesy and cooperation that was extended to our auditor.

Attachment

cc: Kayla J. Gillan, Deputy Chief of Staff, Office of the Chairman
Diego Ruiz, Executive Director, Office of the Executive Director
Barry D. Miller, Associate Director, Office of Legal and Disclosure, Division of Investment Management

Review of the SEC's Section 13(f) Reporting Requirements

Executive Summary

Background. In 1975, Congress enacted Section 13(f) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78m(f), to increase the public availability of information regarding the securities holdings of institutional investors. According to the legislative history for Section 13(f), Congress intended to create in the Securities and Exchange Commission (SEC or the Commission) a centralized repository of historical and current data regarding the activities of institutional investment managers in order to improve the body of publicly available factual data and thereby increase investor confidence in the integrity of the U.S. securities markets. This legislative history also reflects that Congress anticipated that government agencies, including the SEC, would be expected to make extensive use of the institutional disclosure data in fulfilling their responsibilities to protect the public interest within a consistent and coordinated regulatory framework.

Section 13(f) and the Commission's implementing regulation require institutional investment managers that exercise investment discretion with respect to accounts holding certain equity securities having an aggregate fair market value of $100 million or more on the last trading day in a calendar year to file quarterly reports of their holdings with the SEC on Form 13F electronically through the Commission's Electronic Database Gathering and Retrieval (EDGAR) system. Under Commission Rule 13f-1, 17 C.F.R. § 240.13f-1,

the Form 13F reports must be filed within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year. Section 13(f)(3) mandates that the Commission tabulate the information contained in the quarterly reports and disseminate that information to the public.

For the purposes of Section 13(f), an institutional investment manager is an entity that invests in or trades securities for its own account, or a person or entity that exercises investment discretion over someone else's account. The institutional investment managers that are required to file the Form 13F reports typically include investment advisers, banks, insurance companies, broker-dealers, pension funds and corporations. Institutional investment managers exercise investment discretion if they have the power to determine which securities are bought or sold for accounts under management, or if they make decisions about which securities are bought or sold, even if someone else is responsible for the investment decision.

The securities that must be reported under Section 13(f) generally include equity securities that are traded on an exchange or quoted on National Association of Securities Dealers Automated Quotations (NASDAQ), equity options and warrants, shares of closed-end investment companies, and some convertible debt securities. Under Section 13 (f)(3) of the Exchange Act, the Commission is responsible for publishing an official list of the securities that must be reported pursuant to Section 13(f)(1). Form 13F requires disclosure of the name and address of the institutional investment manager filing the report and,

for each security being reported, specific information, including the name of the issuer, the class, the CUSIP[1] number, the number of shares or principal amount, and the aggregate fair market value.

Pursuant to Commission Rule 24b-2, 17 C.F.R. § 240.24b-2, an institutional investment manager may request confidential treatment of information required to be reported on Form 13F. Section 13(f)(3) of the Exchange Act, 15 U.S.C. § 78m(f)(3), provides that the Commission may prevent or delay the public disclosure of the information reported under Section 13(f)(1) in accordance with the Freedom of Information Act (FOIA). Section 13(f)(3) further provides that information identifying securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be publicly disclosed. The Commission has delegated authority to the SEC's Division of Investment Management (IM) to grant or deny applications for confidential treatment pursuant to Section 13(f), and to revoke any grants of confidential treatment for such applications.

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[1] According to the Commission's website, "CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities including: stocks of all registered U.S. and Canadian companies, and U.S. government and municipal bonds. The CUSIP system—owned by the American Bankers Association and operated by Standard & Poor's —facilitates the clearing and settlement process of securities." CUSIP Number, http://www.sec.gov/answers/cusip.htm. A CUSIP "number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security." *Id.*

Objectives. The Office of Inspector General (OIG) conducted a review in order to examine whether the Commission's implementation of and current practices under Section 13(f) meet Congress's intent in establishing Section 13(f), to examine the sufficiency of the Commission's existing policies and procedures that implement Section 13(f), and to determine whether the reporting of entities covered under Section 13(f) is appropriately designed to comply with the statutory requirements. The objectives also included an examination of whether the Commission's policies and procedures for reviewing and processing requests for confidential treatment of information required to be reported under Section 13(f) are adequate and appropriate. In addition, we performed the review to determine whether the oversight over the Section 13(f) process is sufficient.

Results. Overall, our review found that significant improvements can be made with respect to the SEC's review and monitoring of the information reported under Section 13(f). Significantly, our review found that despite Congressional intent that the SEC would be expected to make extensive use of the Section 13(f) information for regulatory and oversight purposes, no SEC division or office conducts any regular or systematic review of the data filed on Form 13F. We found that while IM has delegated authority to grant or deny confidential treatment pursuant to Section 13(f), no SEC division or office has been delegated authority to review and analyze the 13F reports, and no division or office considers this task as falling under its official responsibility. Our review found that the information filed on Form 13F can be useful and should be reviewed in a routine and systematic manner.

The OIG's review also disclosed that no SEC division or office monitors the Form 13F filings for accuracy and completeness. As a result, many Forms 13F are filed with errors or problems, which may not be detected or corrected in a timely manner. Because no routine monitoring is conducted, errors or problems with the Form 13F filings are typically detected only in connection with IM's processing of Section 13(f) confidential treatment requests (CTRs), or when a member of the public notifies IM of an error in or problem with a Form 13F. Our review also found that there are no checks built into the EDGAR system, through which the Forms 13F are filed, to scan for obvious errors in the forms. Moreover, we found that the current text file format of Form 13F limits the facility to extract, organize and analyze the data being reported.

In addition, our review disclosed that a third party prepares the official list of Section 13(f) securities that the Commission is required to provide to the public, and has been doing so since 1981, based upon specifications received from the SEC in 1979. The official list prepared by the third party is posted to the Commission's website each quarter; however, no SEC division or office conducts any review of the list for accuracy and completeness before it is posted. We believe that such a review is important, given that institutional investment managers rely on the official list in preparing their Form 13F reports in accordance with Commission Rule 13f-1. We further found that the SEC has no contract or agreement with the third party with respect to the preparation of the official list of Section 13(f) securities. The lack of a formal contract poses a risk to the SEC that the third party could stop preparing the list at any time, and this informal

arrangement appears to violate the voluntary services prohibition of the Antideficiency Act, 13 U.S.C. § 1342.

The OIG's testing of a sample of CTRs processed by IM revealed that files and supporting documentation could not be located for approximately one-half of the CTRs selected in our initial sample of 25 items. When we selected an additional 12 CTRs, files could not be located for two-thirds of the additional 12 items. The missing files raised concerns that confidential information reported on Form 13F could be inadvertently disclosed. Our testing also indicated that the SEC is not complying with its records retention schedule for CTRs. In addition, our review found that with respect to several CTRs, IM had not rendered a final decision on a timely basis, thus affording certain filers *de facto* confidential treatment of their 13F reports.

Finally, our review disclosed that the current Section 13(f) reporting requirements are outdated and do not currently require disclosure of all significant activities of institutional investment managers, thus rendering the data less useful than it could be to investors and regulators.

Summary of Recommendations. Our review determined that several improvements in the Section 13(f) reporting process are needed to ensure, consistent with Congress' intent in enacting this Section, that useful and reliable data is provided to the public and government regulators.

Specifically, we recommend that:

(1) The Chairman's Office delegate primary responsibility for reviewing and analyzing Form 13F information to the appropriate division or office;

(2) The Chairman's Office assign to the appropriate divisions or offices responsibility for monitoring Section 13(f) filings for accuracy and completeness in order to limit the errors in or problems with the filings, thereby enhancing the usefulness and reliability of the data;

(3) IM and the Office of Information Technology (OIT) continue previous efforts to implement checks in the EDGAR system to detect and/or correct obvious errors in Forms 13F;

(4) IM, in consultation with the Chairman's Office, work with OIT to pursue updating Form 13F to a more structured format that will make the data easier to extract and analyze;

(5) The Chairman's Office assign to an appropriate division and/or office responsibility for reviewing the official list of Section 13(f) securities that is prepared quarterly by a third party and test it on a sample basis;

(6) IM, in consultation with the Office of Administrative Services and the Chairman's Office, ensure that the SEC enters into a formal contract or agreement with the third

party that prepares the official list of Section 13(f) securities;

(7) IM and the SEC's Records Management Branch modify their respective policies and procedures to ensure that files for processing CTRs are properly maintained and retained in accordance with the SEC's record retention schedule;

(8) IM, in consultation with the Chairman's Office, take appropriate steps to improve its policies and procedures to ensure that written requests for confidential treatment (particularly certain novel requests) under Section 13(f) are granted or denied within an appropriate time frame so that filers are not afforded *de facto* confidential treatment as a result of IM not issuing a written response;

(9) IM, in consultation with the Office of the General Counsel (OGC), the Office of International Affairs and the Chairman's Office, take appropriate steps to improve its policies and procedures to ensure that requests for relief under Section 13(f) made by certain large foreign institutional investment managers are addressed in a timely and appropriate manner;

(10) IM, in consultation with the Division of Risk, Strategy, and Financial Innovation (Risk Fin), OGC and the Chairman's Office, determine whether legislative changes to Section 13(f) should be pursued;

(11) IM, in consultation with the Chairman's Office, request that Risk Fin update its previous analysis of the impact of increasing the Section 13(f) reporting threshold of $100 million; and

(12) IM, in consultation with Risk Fin and the Chairman's Office, determine whether to recommend that the Commission adopt a rule requiring institutional investment managers to report aggregate purchase and aggregate sales of securities under Section 13(f).

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Background and Objectives

Background

Section 13(f) Reporting Requirement

Congress adopted Section 13(f) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78m(f), as part of the Securities Acts Amendments of 1975. According to the Securities and Exchange Commission (SEC or the Commission), this Section required a reporting system that was "intended to create in the Commission a central repository of historical and current data about the investment activities of institutional investment managers," thereby advancing two separate objectives.[2] First, the reporting system was "designed to improve the body of factual data available and, thus, facilitate consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence."[3] Second, "by making the Commission responsible for all gathering, processing, and dissemination of the data, Congress intended to permit

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[2] Filing and Reporting Requirements Relating to Institutional Investment Managers, Release No. 34-14852 (June 15, 1978), 43 Fed. Reg. 26700, 26701 (June 22, 1978).

[3] *Id.*

establishment of uniform reporting standards and centralized data base."[4] The legislative history for Section 13(f) indicates that Congress believed that the dissemination of data about institutional investment managers would "stimulate a higher degree of confidence among all investors in the integrity of [the U.S.] securities markets."[5] Congress also believed that the institutional disclosure data would be used extensively by government agencies, including the SEC, in fulfilling their regulatory responsibilities.[6]

Specifically, Section 13(f)(1) requires that institutional investment managers that exercise investment discretion with respect to accounts holding equity securities of a class described in Section 13(d)(1) of the Exchange Act having an aggregate fair market value of at least $100,000,000 (or a lesser amount that the Commission may by rule determine but in no case less than $10,000,000) "shall file reports with the

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[4] *Id.* (citing Report of the Senate Comm. on Banking, Housing, and Urban Affairs, Senate Report No. 75, 94th Cong. 1st Sess. 85 (1975)).

[5] Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 94-75 at 78 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 261. *See also* Division of Investment Management: Frequently Asked Questions About Form 13F (May 2005)(Frequently Asked Questions), http://www.sec.gov/divsions/investment/13ffaq.htm, Question 1 at p. 1 ("Congress believed that this institutional disclosure program would increase investor confidence in the integrity of the United States securities markets.").

[6] Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 94-75 at 79 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 261.

Commission, in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter."[7] For each equity security held on the last day of the reporting period with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts the Commission, by rule, determines to be insignificant), the following information must be reported: "the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security."[8]

The Commission's website describes an "institutional investment manager" as follows:

> In general, an institutional investment manager is: (1) an entity that invests in, or buys and sells, securities for its own account; or (2) a person or an entity that exercises investment discretion over the account of any other person or entity. Institutional investment managers can include investment advisers, banks,

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[7] 15 U.S.C. § 78m(f)(1).

[8] *Id.* Section 13(f)(1) also list other information that the Commission may, by rule, require to be reported for accounts with respect to which the institutional investment manager exercises investment discretion.

insurance companies, broker-dealers, pension funds, and corporations.[9]

With regard to the term "investment discretion," Division of Investment Management's (IM) Frequently Asked Questions (FAQs) About Form 13F state that "[a]n institutional investment manager exercises investment discretion if: (i) the manager has the power to determine which securities are bought or sold for the account(s) under management; or (ii) the manager makes decisions about which securities are bought or sold for the account(s), even though someone else is responsible for the investment decisions."[10]

The securities that must be reported pursuant to Section 13(f), *i.e.*, Section 13(f) securities, "generally include equity securities that trade on an exchange or are quoted on the Nasdaq National Market, some equity options and warrants, shares of closed-end investment companies, and some convertible debt securities;" however, "[t]he shares of open-end investment companies (*i.e.*, mutual funds) are not Section 13(f) securities."[11] The securities that must be reported are those contained in an official list of securities that the Commission is required to make

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[9] Form 13F—Reports Filed by Institutional Investment Managers, http://www.sec.gov/answers/form13f.htm. *See also* Frequently Asked Questions, Question 3 at pp. 1-2.

[10] Frequently Asked Questions, Question 6 at p. 3 (citing Section 3(a)(35) of the Exchange Act and Commission Rule 13f-1(b)).

[11] Form 13F—Reports Filed by Institutional Investment Managers, http://www.sec.gov/answers/form13f.htm. *See also* Frequently Asked Questions, Question 7 at p. 3.

available to the public for a reasonable fee and update no less frequently than reports are required to be filed pursuant to Section 13(f)(1).[12]

Commission Rule 13f-1 requires that institutional investment managers that exercise investment discretion with respect to accounts holding Section 13(f) securities having an aggregate fair market value on the last trading day of any month of a calendar year of at least $100 million file a report with the Commission on Form 13F within 45 days after the end of the calendar year, and within 45 days after the end of the first three quarters of the subsequent calendar year.[13] According to the Commission's website, "Form 13F requires disclosure of the names of institutional investment managers, the names of the securities they manage and the class of securities, the CUSIP number, the number of shares owned, and the total market value of each security."[14]

Form 13F must be filed electronically using the Commission's EDGAR system; paper filings are only

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[12] 15 U.S.C. § 78m(f)(3); *see also* 17 C.F.R. § 240.13f-1(c).

[13] 17 C.F.R. § 13f-1(a). *See also* Frequently Asked Questions, Question 28 at p. 8 (noting that an institutional investment manager should file its first Form 13F for the December quarter for the calendar during which it first reaches the $100 million filing threshold, and will then need to submit filings for the March, June, and September quarters of the following calendar year, even if the market value of its Section 13(f) securities falls below the $100 million level).

[14] Form 13F—Reports Filed by Institutional Investment Managers, http://www.sec.gov/answers/form13f.htm. *See also* Frequently Asked Questions, Question 8 at pp. 3-4.

permitted if the filer has been granted a hardship exemption.[15] Form 13F consists of three separate parts: a cover page, a summary page, and an information table (which contains the reportable information for the Section 13F securities).[16] There are three different types of Form 13F reports: a 13F Holdings Report (used if all of an institutional investment manager's Section 13(f) securities are listed on its Form 13F); a 13F Combination Report (used if some of the institutional investment manager's Section 13(f) securities are listed on its Form 13F, and the rest are listed on someone else's Form 13F; and a 13F Notice (used if all of the institutional investment manager's Section 13(f) securities are reported on someone else's Form 13F).[17]

Section 13(f) Confidential Treatment Requests

Confidential treatment is available for information required to be reported under Section 13(f) under certain circumstances. According to guidance issued by IM, while Congress intended for the Section 13(f) information to be promptly disseminated to the public, it also recognized that, in some instances, disclosure of certain information could have harmful effects, both on an institutional investment manager and on the investors whose assets are under its management.[18]

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[15] Frequently Asked Questions, Questions 13 and 14 at p. 5.

[16] Frequently Asked Questions, Question 31 at p. 9.

[17] Frequently Asked Questions, Question 33 at p. 9.

[18] Letter from Douglas Scheidt, Associate Director and Chief Counsel, Division of Investment Management to Section 13(f)

Accordingly, "[t]o balance these competing interests, Section 13(f)(3) authorizes the Commission to delay or prevent the public disclosure of information as it determines to be necessary or appropriate in the public interest or for the protection of investors."[19]

Section 13(f)(3) allows for confidential treatment of information required to be filed under that Section in two respects. First, Section 13(f)(3) provides that "the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any . . . information [filed in reports required by Section 13(f)] in accordance with section 552 of Title 5 [the Freedom of Information Act (FOIA)]."[20] According to the IM's FAQs About Form 13F, "[a]t a minimum, requests for confidential information must satisfy the requirements of FOIA Exemption 4 which protects 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.'"[21]

Second, Section 13(f)(3) further provides that "[n]otwithstanding the preceding sentence, any such information identifying the securities held by the

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Confidential Treatment Filers (June 17, 1998)(Scheidt Letter), http://www.sec.gov/divisions/investment/guidance/13fpt2.htm, at p. 2.

[19] *Id.*

[20] 15 U.S.C. § 78m(f)(3).

[21] Frequently Asked Questions, Question 52 at pp. 14-15 (quoting 5 U.S.C. § 552(b)(4)).

account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public."[22] This category of confidential information is referred to as the "personal holdings exemption."[23] Confidential treatment based on the personal holdings exemption lasts indefinitely, although the filer may not "always receive confidential treatment because changed circumstances may make the personal holding exemption inapplicable."[24]

CTRs must be made in accordance with Rule 101(c)(1)(i) of Regulation S-T,[25] and the Confidential Treatment Instructions 1 and 2 to Form 13F. In addition, confidential treatment applications must follow the procedural requirements contained in Rule 24b-2 under the Exchange Act.[26] CTRs must be submitted in paper, although the filer must still submit the public Form 13F electronically via EDGAR,

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[22] 15 U.S.C. § 78m(f)(3).

[23] Frequently Asked Questions, Question 52 at p. 14.

[24] *Id.*, Question 55a at p. 16.

[25] 17 C.F.R. § 232.101(c)(i). This rule requires that CTRs, and the information with respect to which confidential treatment is sought, be filed in paper form only.

[26] 17 C.F.R. §240.24b-2. Under this rule, an application for confidential treatment must include, among other things, an analysis of the applicable exemption(s) from disclosure under the Commission's rules and regulations adopted under the FOIA, and a justification of the time period for which confidential treatment is sought.

omitting the information for which confidential treatment is sought.[27]

The Commission has delegated to the Director of IM the authority to grant or deny applications for confidential treatment of information filed under Section 13(f), and to revoke a grant of confidential treatment for any such application.[28]

IM has put in place well-constructed review procedures for processing CTRs, especially in novel or complicated cases involving ongoing investment strategies for acquisitions and dispositions. IM carefully reviews the information the filers provide as a basis for seeking confidential treatment and researches public data in order to validate the basis provided by the filer.

Additionally, IM's procedures appropriately provide for the assignment of CTR applications to the pertinent staff, and for the proper supervision of those staff. Specifically, CTR applications are reviewed by IM attorneys, who are each assigned the applications of a number of institutional investment managers. This practice allows continuity and enables the attorney to build rapport with the filers. More complicated requests are assigned to senior attorneys, while routine requests, such as personal holdings exemption requests, are assigned to new attorneys or paralegal specialists. The IM attorneys who work on CTRs are

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[27] Frequently Asked Questions, Question 53 at p. 15. *See also* Form 13F, Instructions for Confidential Treatment Requests at p. 2.

[28] 17 C.F.R. § 200.30-5(c)(1) and (2).

generally knowledgeable of the confidential treatment process and encouraged to consult with one another and their supervisors. Further, an IM Branch Chief reviews all CTRs, except for personal holdings exemption requests that have been granted in the past. An IM Assistant Director and the Chief Counsel review the CTRs and response letter in certain novel cases, and the Chief Counsel reviews all denial letters and any appeals filed by the institutional investment managers.

Objectives

The objectives of the review were to examine whether the Commission's implementation of and current practices under Section 13(f) meet Congress's intent in establishing Section 13(f), to examine the sufficiency of the Commission's existing policies and procedures that implement Section 13(f), and to determine whether the reporting of entities covered under Section 13(f) is appropriately designed to comply with the statutory requirements. The objectives also included an examination of whether the Commission's policies and procedures for reviewing and processing requests for confidential treatment of information required to be reported under Section 13(f) are adequate and appropriate. In addition, we performed the review to determine whether the oversight over the Section 13(f) process is sufficient.

Findings and Recommendations

Finding 1: Despite the Intent of Congress in Prescribing the Section 13(f) Reporting System that the SEC Would Make Extensive Use of the Section 13(f) Information for Regulatory and Oversight Purposes, the SEC Conducts No Continuous or Systematic Review or Analysis of the Form 13F Reports

> No SEC division or office has been delegated authority to review the Section 13(f) reports, and no regular or systematic review or analysis of this information is conducted.

Section 13(f)(3) requires the Commission to tabulate the information contained in any reports filed pursuant to Section 13(f) "in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public."[29] That subsection further requires the Commission to make this information available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except where the Commission determines that information should be afforded confidential treatment.[30]

Consistent with the statutory language, the legislative history for Section 13(f) makes clear that Congress

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[29] 15 U.S.C. § 78m(f)(3).

[30] *Id.*

anticipated that regulatory agencies, including the SEC, would be expected to make extensive use of the information required to be disclosed under Section 13(f). That legislative history stated, in part, as follows:

> Moreover, the SEC, bank regulatory agencies, and other agencies (both federal and state) could be expected to make extensive use of the institutional disclosure data in fulfilling their responsibilities to consider and develop standards designed to protect the public interest within a consistent and coordinated regulatory framework. It would be expected that the SEC might use the institutional disclosure data in generally two different ways: to analyze the characteristics of institutional investment managers, and to analyze the impact of institutional investment managers on the securities markets.[31]

The Commission itself has recognized in various orders it has issued that "[t]he legislative history of [S]ection 13(f) suggests that the provision was designed to further regulatory and policymaking uses of the information, as well as to contribute to the transparency and integrity of, and investor confidence, in the U.S. equity markets."[32] In addition, in a cease-

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[31] Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 94-75 at 79 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 261.

[32] *In re Wynnefield Capital Management LLC and Wynnefield Capital, Inc.*, Release No 34-61930 (Apr. 16, 2010), at 1-2 (citing S. Rep. No. 75 at 80-84); *In re Full Value Advisors, LLC*, Release

and-desist proceeding involving a hedge fund's repeated failure to file Forms 13F, the Commission noted the current importance of Section 13(f) information as follows:

> The information is valuable to the Commission because it "facilitate[s] consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence." Reporting by Institutional Investment Managers of Information With Respect To Accounts Over Which Investment Discretion is Exercised, Release No. 34-13396, at 1 (Mar. 22, 1977). **The need for such information in the regulatory oversight of market practices is at least as acute today, when institutional investment managers oversee in excess of $1 trillion of hedge fund investments, as it was in 1975 when Section 13(f) was enacted.**[33]

No. 34-61327 (Jan. 11, 2010) at 2 (same citation). See *also In re Quattro Global Capital, LLC*, Release No. 34-56252 (Aug. 15, 2007), at 2 ("The Congressional purpose in enacting Section 13(f) of the Exchange Act was 'to create a central depository of historical and current data about the investment activities of institutional investment managers' to assist investors and government regulators." (quoting S. Rep. No. 94-75, 94th Cong., 2d [sic] Sess. 82-85 (1975)).

[33] *In re Quattro Global Capital, LLC*, Release No. 34-56252 (Aug. 15, 2007), at 2-3 (emphasis supplied).

Moreover, the Commission has represented that the Commission staff is using Section 13(f) information for a variety of regulatory purposes, stating as follows:

> The information collected on Forms 13F has been and continues to be used by U.S. regulators, academics, the media and financial information distributors, and investors, and other U.S. equity markets participants, as intended by Congress. The Commission's staff use Form 13F information for a variety of research, oversight, and enforcement purposes. The Commission's staff also use Form 13F-based academic research, for example, to analyze the Commission's rulemaking initiatives under the federal securities laws.[34]

Our review found that, despite the statements above concerning the use of Form 13F information for a variety of oversight and other purposes, the SEC does not, in fact, conduct any continuous or systematic review or analysis of that information. As noted above, the Director of IM has been delegated authority to grant or deny applications for confidential treatment of information filed under Section 13(f), and to revoke a grant of confidential treatment for any such application. However, no Commission division or office has been delegated authority to review the Form 13F filings. As a consequence, no SEC division or office considers reviewing Form 13F as falling under its official responsibility, and no division or office conducts such a review on a systematic or ongoing basis.

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[34] *In re Full Value Advisors, LLC*, Release No. 34-61327 (Jan. 11, 2010), at 4 (footnote omitted).

IM management informed us that the "oversight" uses referred to in the Commission order described above referred to the review of certain Forms 13F performed by other Commission divisions or offices. IM stated its belief that the Office of Compliance Inspections and Examinations (OCIE), during its periodic examinations and surveillance, checks to see whether a registered investment adviser or broker-dealer files Form 13F, but generally does not substantively review the Form 13F reports that such registrant files. Our review found that only in rare occasions would Forms 13F be reviewed during OCIE Examinations. While OCIE on occasion encounters instances when registered entities that should have filed Form 13F failed to do so, these instances are infrequent because compliance with Section 13(f) is not the focus of OCIE's examinations of registered entities, and OCIE lacks jurisdiction over institutional investment managers that are not registered.[35]

Our review also disclosed that Risk Fin economists have used Form 13 F data to conduct analyses,[36] and

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[35] OCIE staff estimated that they find issues with Form 13F in less than 5 percent of OCIE's examinations.

[36] According to Risk Fin, Form 13F data have formed the basis of numerous academic studies, some of which were conducted by economists at the SEC and some of which were prepared by economists working outside the SEC. Risk Fin stated that the SEC staff regularly rely on economic research of this nature.

that SEC staff use Form 13F data to inform Commission rule making.[37] In addition, Risk Fin pointed out that Commission staff routinely use Form 13F data to formulate penalty recommendations in corporate fraud cases. Nonetheless, there is no systematic review or analysis of Form 13F data being conducted. One Risk Fin staff member expressed the belief that the data in Form 13F filings is useful to research the holdings of large institutional investment managers in particular, as the large managers have the resources and knowledge to report Form 13F data correctly.[38]

A Risk Fin staff member provided an example of useful information that may be provided by review and analysis of the information filed on Form 13F. In that instance, a Risk Fin employee who was conducting research on the valuation of warrants noted a zero value for certain warrants reported by institutional investment managers on Form 13F. The Risk Fin employee contacted OCIE, which reviewed Form 13F filings to determine the valuation of similar warrants and determined that institutional investment managers reported different values for the same warrants. OCIE is in the process of obtaining supporting documentation from registered filers and plans to contact the Division of Trading and Markets

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[37] Risk Fin cited the proxy access rule as a recent example of Form 13F data being used to support a rulemaking. *See* Facilitating Shareholder Director Nominations, File No. S7-10-09 (Aug. 25, 2010).

[38] This Risk Fin staff member indicated that errors in Form 13F filings (*see* Findings 2 and 3) appeared to be more prevalent in the filings of small managers who have less resources and expertise.

in an effort to obtain similar information from non-registrants. IM staff acknowledged that the valuation of warrants would be materially important, for example, if it were to impact whether an institutional investment manager has exceeded the Section 13(f) reporting threshold of $100 million. In addition, IM indicated that research into the methodology used to value the warrants might reveal that one model is better than other models, such that IM might wish to notify certain institutional investment managers of the preferred methodology.

Our review concluded, therefore, that a systematic review of Form 13F information can provide valuable information and should be conducted to ensure that the SEC is making the maximum use of the Form 13F information, consistent with the intent of Congress.

Recommendation 1:

The Chairman's Office should delegate primary responsibility for reviewing and analyzing Form 13F information to the appropriate division or office.

Management Comments. The Chairman's Office concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that the Chairman's Office concurred with this recommendation.

Finding 2: The Lack of Monitoring of the Form 13F information by the SEC Renders this Data Less Useful and Reliable than Congress Had Intended

> There is no periodic monitoring of the Section 13(f) reporting process, including no review of the Form 13F filings for accuracy and completeness.

As mentioned in Finding 1, the OIG review has found that no Commission division or office is responsible for reviewing Form 13F filings and that, as a consequence, no systematic review of the Form 13F filings is conducted. The OIG review also found that the SEC conducts no periodic monitoring of the Form 13F filings to ensure the accuracy and completeness of the information that is reported. As a general matter, apart from the review of Form 13F as a result of an institutional investment manager's request for confidential treatment of Form 13F information, the majority of the monitoring or checking of this information by IM is performed only after a member of the public notifies IM of an error in or problem with a Form 13F, or IM receives a referral from another SEC division or office.

Further, as discussed above, our review found that only on rare occasions during examinations does OCIE identify entities subject to 13(f) that failed to file the required reports. On these very few occasions, OCIE issues a deficiency letter, requesting that the entity file the required Form 13F. The entity then typically sends a written response to the examination team and makes the necessary filing(s) or amended filing(s). The examination team then checks in EDGAR to ensure

that the required filing or filings were made. However, no continuous monitoring is performed to ensure that the entities that failed to file Form 13F make the required filings in the future, and OCIE does not notify IM of these situations.[39]

IM's Current Procedures for Addressing Errors in or Problems with Forms 13F

We found in our review that IM has no formal procedures for monitoring or checking the Form 13F filings, as IM's Section 13(f) work focuses almost exclusively on CTRs. Apart from the reviews of Forms 13F conducted pertinent to the review of CTRs, the only examination of the Form 13F filings we identified was the informal work of one paralegal specialist in IM, who primarily collects information from entities or individuals outside of the Commission about errors with the Form 13F filings. According to this one paralegal specialist, while she does not conduct any systematic monitoring or checking of the forms, members of the public, including certain research centers, graduate students, individual researchers, academia, investors, and financial institutions periodically review Form 13F filings and notify her of issues or problems identified with the filings. In addition, on occasion, errors in or problems with Form 13F are identified as a result of filers contacting the paralegal requesting assistance on other issues, or by

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[39] IM staff believe that OCIE should monitor these entities and their filings, since IM is not responsible for reviewing Forms 13F apart from assessing CTRs, and the failure to file the Form 13F was detected through an OCIE examination.

staff in IM or other SEC divisions or offices who are performing other work.[40]

We found that the errors or problems identified with Form 13F filings are not infrequent. The paralegal indicated that she receives approximately 20 to 25 calls a week near the time period when quarterly filings are due and posted on the SEC's website. The paralegal specialist maintains e-mails and logs of calls from the public on issues with certain Form 13F filings and researches the issues or follows up with the institutional investment managers. She enters complicated issues related to Section 13(f) CTRs and errors in Form 13F filings in IM's Office of Chief Counsel's internal database. However, our review found that complaints and issues noted by the public regarding Form 13F filings are not separately identified in the database.

The paralegal specialist indicated that she attempts to correct the errors or problems that are identified through an informal process. This process includes contacting the institutional investment managers, notifying them of the deficiencies or errors identified, and setting a general time table to address the issues. However, according to the paralegal specialist, issues identified with Form 13F filings may take many months to resolve, as the errors or problems identified may cover many quarterly filings.

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[40] According to the paralegal, the public identified about 70 percent of the Form 13F issues brought to her attention, while the remaining 30 percent are discovered in working with filers or by Commission staff.

Examples of the Errors in or Problems Related to the Form 13F Filings

Based upon the number of issues identified with the Form 13F filings, including those found by entities outside the SEC and the lack of any formal or systematic monitoring by the SEC, the review has determined that the public may not always be obtaining accurate and complete data, or the most useful information, on Form 13F. Our review of IM's log and supporting documents revealed the following examples of concerns with or errors in certain Form 13F filings that were identified by the public:

- A graduate student regularly reviewed Form 13F filings and informed the IM paralegal specialist of numerous issues, including those relating to the Form 13F of a particular bank. In that instance, the bank used an expired Form 13F in paper format, rather than the EDGAR form that became available in 1999. IM's inquiry of the bank revealed that the bank had been using the old form since it began filing Form 13F and had not previously been notified of the error.

- An employee from a stock research firm notified IM that a European bank affiliate operating in the United States did not file Form 13F for the period ended December 31, 2009. When the paralegal specialist contacted the U.S. bank, she was informed that its holdings were now aggregated with those of the European bank. However, the European bank had also not filed Form 13F. According to IM, the filing deficiencies with respect to such European bank and its U.S. affiliate have

been corrected as of June 14, 2010 (after the commencement of our fieldwork).

Our review disclosed that as of June 7, 2010, the paralegal specialist was working on approximately 22 cases involving issues with Form 13F that were noted by the public and had not been fully addressed. A formalized process for systematic monitoring of Form 13F, even if merely on a test basis, would detect errors or other issues and problems with Form 13F and ensure that these types of issues are addressed and corrected on a timelier basis. As a consequence, the public would be provided with more accurate, complete and useful information, consistent with the intent of Congress in enacting Section 13(f). While the OIG acknowledges that it would be too cumbersome and time-consuming to perform a review of every Form 13F (in its current form), as there are at least 3,000 to 4,000 filers each quarter, the SEC could audit the Form 13F files of a sample of filers and review the Form 13F filings of new filers.

Recommendation 2:

The Chairman's Office should assign to the appropriate divisions or offices responsibility for monitoring Section 13(f) filings for accuracy and completeness in order to limit the errors in or problems with the filings and thereby enhance the usefulness and reliability of the data.

Management Comments. The Chairman's Office concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are please that the Chairman's Office concurred with this recommendation.

Finding 3: There Is No Mechanism by Which the SEC Scans for Obvious Errors in Forms 13F, Resulting in These Forms Being Uploaded in EDGAR with Errors

Currently, the Forms 13F that are uploaded through EDGAR are not scanned for obvious errors. Therefore, there is no system in place to limit the amount of errors contained on the forms.

In addition to the lack of monitoring of Form 13F (*see* Finding 2 above), the SEC has not implemented any tool to scan for and/or correct obvious errors on Form 13F. As noted above, errors on Forms 13F are generally only detected if they are identified by the public or noted by IM during its review of CTRs. Moreover, the errors that are identified are often not corrected on a timely basis. As a result of the errors on the Forms 13F, the benefits of the reporting system are minimized.

In connection with discussions regarding the possible modernization of Form 13F that took place in 2005 but were not pursued (*see* Finding 4 below), OIT, in consultation with IM, prepared a document detailing the types of errors that might be made in filing Form 13F (*e.g.*, failing to complete a required field, entering a date in an improper format) and possible help messages for those errors. These efforts should be pursued and checks should be implemented in EDGAR to prevent incomplete or plainly erroneous filings from being submitted, such as filings that are inadvertently

dated far into the future or contain mismatched or inappropriate table alignments. In addition, other measures should be taken to scan for and/or correct readily identifiable errors on the Forms 13F that are filed through EDGAR.

Recommendation 3:

The Division of Investment Management and the Office of Information Technology should renew the efforts that were begun in 2005 and implement checks in the Electronic Data Gathering and Retrieval (EDGAR) system that will detect and/or correct obvious errors contained in the Forms 13F that are uploaded in EDGAR.

Management Comments. IM and OIT concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that IM and OIT concurred with this recommendation.

Finding 4: The Current Text File Format of Form 13F Limits the Usefulness of the Data Reported on the Form

The data submitted on the current electronic Form 13F is difficult to analyze and manipulate due to the text file format of Form 13F and the lack of uniformity in reporting data on the form.

Form 13F was initially submitted in paper format. During a phase-in to mandatory electronic filing, the Commission permitted institutional investment managers to report their holdings electronically on

former Form 13F-E, on a voluntary basis.[41] In January 1999, the Commission adopted amendments to mandate the electronic filing of Form 13F using the EDGAR system.[42] Effective April 1, 1999, institutional investment managers were required to file Form 13F electronically on EDGAR.[43]

At the time electronic submission of Form 13F on EDGAR became mandatory in 1999, the SEC decided to use a text file format for Form 13F. EDGAR imposes a maximum line length of 132 characters, thus limiting the amount of information that can be submitted on a line. In addition, IM staff indicated the text file format of Form 13F limits its usefulness because the data is not manageable and cannot be easily analyzed.

Our review also found that the text format of Form 13F limits the ability of other SEC divisions and offices to utilize the information effectively. For example, one Risk Fin staff member observed that Form 13F should be submitted in machine-readable form instead of an unformatted text file. This is because data submitted on Form 13F cannot easily be aggregated across filers or merged with other data sets due to the limitations on the text file format of Form 13F and the lack of universal identifiers for the filers. The Risk Fin staff member believes that if Form 13F filings were in a

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[41] Final Rule: Rulemaking for EDGAR System, Release No 34-40934 (Jan. 12, 1999), http://www.sec.gov/rules/final/34-40934.htm, at p. 2.

[42] *Id.* at pp. 1-2.

[43] *Id.* at p. 1.

tagged format, various users, individual researchers and data vendors would be able to extract and merge Form 13F data into a single database. Risk Fin pointed out, however, that some third-party providers make Form 13F data available in a standardized format that is readily usable by Risk Fin economists.

In addition, we found that OCIE sometimes uses Form 13F data in its examinations of investment advisers. An OCIE staff member who is familiar with Form 13F noted that the current EDGAR text file makes it nearly impossible to manipulate the data in order to perform comparison analysis or data mining because the data in the text file must be entered into an Excel spreadsheet or another similar format. Our review also found that while filers are assigned an identification number for use when filing Form 13F, they do not always include the identification number on the form. In addition, Form 13F does not require filers to note their Central Index Key numbers, which identify corporations and/or individuals that have submitted disclosure filings with the SEC. The absence of identification numbers makes it difficult for users to identify particular entities and compare data submitted on Form 13F with information submitted on other types of SEC filings.

We learned through discussions with IM and OIT staff that in or about 2005, IM explored with OIT the possibility of modernizing the format of Form 13F. Specifically, IM and OIT discussed changing the text file format of Form 13F to a more structured format that would use an Extensible Markup Language

(XML) form[44] and would be posted on the SEC's website. However, OIT staff informed us that due to other priorities, such as former Chairman Christopher Cox's efforts to use XBRL (Extensible Business Reporting Language) for company filings, the Form 13F project was never completed. OIT staff indicated that the project delay was not a result of funding issues, as converting Form 13F to XML would not have been very costly.

OIT staff further stated that they have retained requirements documentation from their meetings with IM in 2005. OIT also indicated that it would be possible to pursue this project further if IM is still interested in changing the format of Form 13F. However, based upon the resources that are currently available, OIT has stated that the earliest it could pursue this project actively would be in March 2011.

Recommendation 4:

The Division of Investment Management, in consultation with the Chairman's Office, should work with the Office of Information Technology and update Form 13F to a more structured format, such as Extensible Markup Language (XML), to make it easier for users and researchers to extract and analyze Section 13(f) data.

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[44] XML is a set of rules for encoding documents in machine-readable form; it is a textual data format that is widely used in web services.

Management Comments. IM concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that IM concurred with this recommendation.

Finding 5: The SEC Conducts No Review of the Official List of Section 13(f) Securities Prepared by a Third Party

A third party prepares the official list of securities that is required by Section 13(f)(3) by searching relevant databases based upon criteria the SEC provided. The SEC performs no review of the list and does not monitor it for accuracy and completeness.

Section 13(f)(3) requires that "[t]he Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in [Section 13(d)(1)], updated no less frequently than reports are required to be filed pursuant to [Section 13(f)(1)]."[45] The "Official List of Section 13(f) Securities" is published on the SEC's website on a quarterly basis.[46] Section 13(f) securities are equity securities that are described in Section 13(d)(1) of the Exchange Act.[47] Under Commission Rule 13f-1(c), "[i]n determining what classes of securities are section 13(f) securities, an institutional investment manager may rely on the

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[45] 15 U.S.C. § 78m(f)(3).

[46] *See* http://www.sec.gov/divisions/investment/13flists.htm.

[47] Frequently Asked Questions, Question 7 at p. 3.

most recent list of such securities published by the Commission pursuant to [Section 13(f)(3)]."[48] Only securities of a class included on the list shall be counted in determining whether an institutional investment manager must file a 13(f) report, and only those securities shall be reported.[49]

Our review disclosed that a third party prepares and maintains the official list of Section 13(f) securities, without any review by SEC staff. The third party that prepares and maintains the list informed us that it has provided the official list to the SEC quarterly via FTP transmission[50] (on the 15th of each December, March, June and September) since 1981, based upon specifications originally provided by the SEC in 1979. Hence, a security that qualifies as a Section 13(f) reporting security in the last two weeks of a quarter will be included in the official list for the following quarter.

The third party informed us that it prepares the list quarterly by electronically screening its relevant databases for securities that match the categories provided by the SEC, which include: (1) common stocks or similar securities, (2) convertible preference stocks or preferred stocks, (3) convertible bonds, (4) warrants or rights to purchase common stocks, and (5) options. The third party collects and maintains securities reference data on a daily basis from direct and indirect

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[48] 17 C.F.R. § 240.13f-1(c).

[49] *Id.*

[50] FTP (File Transfer Protocol) is a standard network protocol used to copy files from one host to another.

sources, including exchange feeds, public filings, agency information, prospectuses and official statements, government filings, outside vendors, investment publications and direct issuer sources. The third party stated that it performs quality assurance on the databases used to prepare the official list daily, through the use of measures such edit checks, statistical sampling and change reports.

In order to assess whether the third party has proper controls and processes in place for producing the official listing of Section 13(f) securities, the OIG requested a copy of its Statement of Auditing Standards (SAS) 70 Report Type II, which is an audited report on internal controls and processes prepared by an independent auditor. The third party informed us that its processes and controls are not currently audited by an independent auditor and, therefore, it had no SAS 70 Report Type II.

OIT staff stated that the third party sends the official list on approximately the 18th of the last month of the quarter and that OIT generally posts the official list on the SEC website by the eighth day of the following month. OIT has read-only access to the FTP transmission, and OIT does not compare the data received from the third party with any other information or otherwise review it or check it for accuracy. OIT staff indicated that if there is an issue with the official list (*e.g.*, a delay in receiving the FTP transmission), OIT will contact the third party.

Our review further disclosed that IM performs no review of the official list provided by the third party and had very little involvement with the compilation of the list. We learned of only infrequent contacts (*e.g.*,

once in 2007) between IM staff and the third party regarding whether certain securities or types of securities should be included in the official list. Also, we were not able to identify any contract or agreement with the third party that prescribes how the list is to be prepared (*see* Finding 6 below). Because institutional investment managers are permitted by Commission rule to rely on the official list to prepare their 13F reports, it is important that the official list be up-to-date and accurate. Therefore, the SEC should be performing oversight of the official list, rather than relying exclusively upon a third party.

Recommendation 5:

The Chairman's Office should assign to an appropriate division and/or office responsibility for reviewing the official list of Section 13(f) securities that is prepared by a third party each quarter and testing the list for accuracy and completeness on a sample basis.

Management Comments. The Chairman's Office concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased the Chairman's Office concurred with this recommendation.

Finding 6: The SEC Has No Contract with the Third Party that Compiles the Official List of Section 13(f) Securities

There is no contract between the third party that prepares the official list of Section 13(f) securities and the Commission.

During our review, both IM staff and the third party that provides the official list of Section 13(f) securities informed us that they were not aware of any contract or agreement between the SEC and the third party regarding the preparation of the list. The SEC's Office of Acquisitions within the Office of Administrative Services confirmed that there was no contract between the SEC and the third party and that none had ever been awarded. The third party did provide an informal memorandum, dated March 13, 1979, which enclosed the specifications for the official list of Section13(f) securities. This specifications document discussed the background and requirements of Section 13(f), the definition of Section 13(f) securities, what types of securities should be included on the official list and how the list should be compiled. The document also indicated that a sample layout for the computer tape containing the official list was included. We also found that no payments are being made to the third party by the Commission in connection with the preparation or delivery of the official list of Section 13(f) securities.[51]

Because there is no formal contract between the third party and the Commission regarding the official list of Section 13(f) securities, the third party could stop preparing the official list and providing it to the SEC at any time and the SEC would have no recourse.

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[51] The third party located two purchase orders for 1981 and 1982, which reflected an annual fee of $1,200 for providing a quarterly tape covering Form 13F filings. Nonetheless, the third party confirmed that, to its knowledge, the third party is not receiving payment from the SEC or any other party for the delivery of the Section 13(f) securities file to the SEC.

Moreover, the current arrangement with the third party appears to violate the voluntary services prohibition of the Antideficiency Act, 13 U.S.C. § 1342, which provides, in part, that "[a]n officer or employee of the United States Government or the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

Comptroller General opinions have defined a "no-cost contract" as "a formal arrangement between a government entity and a vendor under which the government makes no monetary payment for the vendor's performance."[52] According to the Comptroller General, "[a]t issue when a federal agency agrees to a no-cost contract and receives services without having to pay is whether the agency has violated the Antideficiency Act's voluntary services prohibition, 13 U.S.C. § 1342."[53] Specifically, a no-cost contract raises the question of whether it is void due to a lack of consideration.[54] In addressing this issue, the Comptroller General has held that an agency may enter into a valid, binding no-cost contract without violating the Antideficiency Act's voluntary services prohibition, because services performed pursuant to a formal contract, in which the agency has no financial obligation and the contractor has no expectation of

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[52] No-Cost Contracts for Event Planning Services, B-308968, 2007 U.S. Comp. Gen. LEXIS 220 (Nov. 27, 2007), at *4.

[53] *Id.* at *4-*5.

[54] *Id.* at *5, n.2.

payment from the government, are not "voluntary" within the meaning of the prohibition.[55]

The current arrangement with the third party would appear to violate 13 U.S.C. § 1342 because there is no formal binding contract between the parties. If it wishes to continue the current arrangement, the SEC should enter into a formal contract or agreement with the third party that specifies that the SEC has no financial obligation and the firm has no expectation of payment from the government.

Recommendation 6:

The Division of Investment Management, in consultation with the Office of Administrative Services and the Chairman's Office, should ensure that the Securities and Exchange Commission (SEC) enters into a formal contract or agreement with the third party that prepares the official list required by Section 13(f)(3) of the Securities Exchange Act of 1934. This contract or agreement should document the third party's responsibilities for providing the official list on a quarterly basis and explicitly state that the SEC has no financial obligation and the firm has no expectation of payment from the government.

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[55] *Id.* at *14. *See also* General Services Administration and Real Estate Brokers' Commission, B-302811, 2004 U.S. Comp. Gen. LEXIS 164 (July 12, 2004)("The acceptance of services without payment pursuant to a valid, binding no-cost contract does not augment an agency's appropriation nor does it violate the voluntary services prohibition.").

Management Comments. IM and OAS concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased IM and OAS concurred with this recommendation.

Finding 7: A Majority of the Confidential Treatment Requests that Were Selected for Testing Lacked Files with Supporting Documents and Forms

Of the 25 CTRs selected in our initial sample, IM or the SEC's Records Management Branch (RM) could not provide files or any supporting documents for 12 of the sample items. When we selected an additional 12 CTRs to replace the initial sample items, IM or RM could not locate files for eight of the 12 additional sample items.

In order to determine whether IM properly processed CTRs, we selected a sample of 25 CTRs to perform testing for compliance with the applicable statutory, regulatory and procedural requirements. For each item selected, we requested a file from IM, and in some cases RM, containing the CTR letter submitted by the institutional investment manager, the applicable Form 13F, supporting documents and, for completed requests, IM's letter responding to the CTR.

In response to our request for these 25 files, IM or RM could not locate any files or provide any supporting documentation for 12 of these sample items (48 percent). For another two sample items (eight percent), no file could be located, but IM did provide supporting documents.

Because we were unable to perform testing on 12 of the items selected in our initial sample of 25 CTRs due to the lack of availability of files or any supporting documentation, we selected an additional 12 CTRs in order to perform compliance testing.

Of the 12 additional sample items, IM provided files for only four items (33.3 percent), and indicated that the files for the remaining eight items (66.7 percent) should be under the custody of RM. The confidential treatment process had been completed with respect to these eight items and IM stated that, consistent with its existing procedures, it had sent the files to RM at various times. When contacted, however, RM could not find the files for any of the eight sample items and indicated that they had no record of ever receiving the files.[56] The large number of missing files limited the amount of testing we were able to perform.

In addition, the large amount of missing files raises concerns that confidential information that may exist in a completed Section 13(f) CTR could be misplaced, lost, or inadvertently disclosed. As institutional investment managers are required to submit to IM the Form 13F containing their holdings in Section 13(f) securities at the time they submit their CTRs,

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[56] RM officials indicated that, under the Commission's records retention schedule, the CTR files should have been in IM's possession if they were less than two years old. RM officials also acknowledged receipt of a box from IM, which they claim did not include an index of the materials contained in the box. RM officials indicated that the box had essentially been untouched since its arrival from IM until the OIG's request for the files and, therefore, RM did not believe that IM ever sent the files in question to RM.

safeguarding these materials after a Section 13(f) CTR is completed is important. As part of our testing, we reviewed supporting documents, such as IM's response letter to the CTR (if such a letter had been issued) or the status of the request according to IM's database listing, to determine how many of the CTRs for which the filings were missing resulted in a grant of confidential treatment. We were able to verify that, as of June 2010, confidential treatment had been granted for six of the original 14 sample items with missing files (43 percent) and for three of the additional 12 sample items with missing files (25 percent). As a consequence, there was no control over nine files that should have contained information for which IM determined confidential treatment was warranted.

Further, based upon the missing files noted during our review, it does not appear that the SEC is complying with its records retention schedule for confidential treatment materials, as IM has not been retaining CTR files for the appropriate in-house retention period and RM indicated that it had no record of receiving the missing files.[57] Our inquiries of IM and RM staff during our review also revealed that they had been unaware that the existing practices and procedures

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[57] *See* National Archives and Records Administration Standard Form 115, Job Number N1-266-98-1, Approved by the Archivist of the United States on Feb. 22, 1999 (requiring transfer of confidential treatment materials to the Federal Records Center after two years and destruction after 20 years.) Based upon the responses to our draft report, we determined that there is considerable disagreement and confusion between RM and IM regarding the appropriate retention schedule for CTR files. This confusion must be remedied in order for appropriate action to be taken consistent with Recommendation 7 of this Report.

regarding the files for Section 13(f) CTRs were not in accordance with the records retention schedule.

Recommendation 7:

The Division of Investment Management and the Records Management Branch should modify their respective policies and procedures to ensure that files for the processing of confidential treatment requests under Section 13(f) of the Securities Exchange Act of 1934 are properly maintained and retained in accordance with the applicable record retention schedule, and should ensure that the established policies and procedures are followed.

Management Comments. IM and RM have concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased IM and RM concurred with this recommendation.

Finding 8: Certain Filers Received *De Facto* Confidential Treatment Even Though Their Applications Did Not Meet the Criteria for Confidential Treatment Under Section 13(f)

Certain requesters received *de facto* confidential treatment although their requests did not meet the substantive criteria for confidential treatment of Section 13(f) information.

Requirements for Obtaining Confidential Treatment Under Section 13(f)

As discussed above, Section 13(f)(3) provides that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent the public disclosure of information filed in Section 13(f) reports in accordance with the FOIA. According to IM, FOIA Exemption 4 is the FOIA exemption that generally applies to Section 13(f) CTRs. IM's FAQs About Form 13F state that "[a]t a minimum, requests for confidential treatment must satisfy the requirements of FOIA Exemption 4 which protects 'trade secrets and commercial or financial information obtained from a person and privileged or confidential.'"[58] The standards for Section 13(f) confidential treatment are set forth in Rule 24b-2 under the Exchange Act and the Instructions to Form 13F. Rule 24b-2(c) states that "[p]ending a determination as to the objection [to public disclosure] filed[,] the material for which confidential treatment has been applied will not be made available to the public."

According to IM's guidance to confidential treatment filers, the legislative history of Section 13(f) emphasizes the importance of granting confidential treatment to an ongoing investment strategy of an investment manager because "[d]isclosure of such strategy would impede competition and could cause

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[58] Frequently Asked Questions, Question 52 at pp. 14-15 (quoting 5 U.S.C. § 552(b)(4)).

increased volatility in the market place."[59] IM's guidance further provides that IM's position is that Section 13(f) CTRs "can be granted only under certain limited circumstances."[60]

The Form 13F confidential treatment request instructions state that "a [m]anager requesting confidential treatment must provide enough factual support for its request to enable the Commission to make an informed judgment as to the merits of the request."[61] The instructions further provide that the request should address all pertinent factors, including several listed relevant factors.[62] These factors include, among other things, the investment strategy being followed with respect to the relevant securities holdings, an explanation of why public disclosure of the securities would likely reveal the investment strategy, a demonstration that such revelation of an investment strategy would be premature, and a demonstration that failure to grant the CTR would likely cause substantial harm to the manager's competitive position.[63] IM's guidance to confidential

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[59] Scheidt Letter at p. 2 (quoting Report of Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 87 (1975)).

[60] Scheidt Letter at p.1.

[61] Form 13F, Instructions for Confidential Treatment Requests at p. 2.

[62] *Id*. *See also* Scheidt Letter at pp. 3-5.

[63] Form 13F, Instructions for Confidential Treatment Requests, at p. 2, Item 2. The confidential treatment instructions to Form 13F also provide for confidential treatment for open risk arbitrage

treatment filers makes clear that a confidential treatment application that does not provide enough information to satisfy the required elements will be denied.[64]

Pursuant to Rule 24b-2(b)(2)(ii) under the Exchange Act, the confidential treatment applicant must justify the time period for which confidential treatment is sought.[65] Confidential treatment based upon a claim that the subject information is confidential, commercial or financial information may initially be requested for a period not to exceed one year from the date the manager is required to file the Form 13F report with the Commission.[66] However, the request "should be limited to the period of time necessary to effectuate the institutional investment manager's investment strategy."[67] In order to extend the time period for which confidential treatment has been granted, the institutional investment manager must

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positions if certain good faith representations are made. If the required representations are made in writing at the time the Form 13F is filed, the Commission will automatically accord the subject securities holdings confidential treatment for a period of up to one year from the date the institutional investment manager is required to file the Form 13F with the Commission. *Id.* at pp. 2-3, Item 2(f).

[64] Scheidt Letter at p. 3.

[65] 17 C.F.R. § 240.24b-2(b)(2)(ii).

[66] Form 13F, Instructions for Confidential Treatment Requests, at p. 2, Item 2(e).

[67] Frequently Asked Questions, Question 57a at p. 21. *See also* Scheidt Letter at p. 3.

file a new request for confidential treatment at least 14 days in advance of the expiration date.[68] If the Commission denies a CTR, or upon expiration of the confidential treatment previously granted for a filing, absent a hardship exemption, the institutional investment manager must submit electronically within six business days of the expiration or notification of the denial, as applicable, a Form 13F report, or an amendment to a publicly-filed Form 13F report.[69]

Certain Filers Have Been Afforded *De Facto* Confidential Treatment

As mentioned above, IM, acting under delegated authority from the Commission, grants or denies applications for confidential treatment of information filed under Section 13(f), and can revoke grants of confidential treatment for any such applications. According to IM, Rule 24b-2(c) under the Exchange Act provides for confidentiality pending review of a Section 13(f) CTR in order to, among other things, safeguard the interest of the requester. Thus, any passage of time before IM issues a written response to a CTR will result in the requester receiving *de facto* confidential treatment for some or all of its reportable securities positions. Our review of records pertaining to approximately 400 Section 13(f) CTRs that were submitted between January 2008 and December 2009 revealed that this has, in fact, occurred in certain situations. One of those ongoing situations, discussed

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[68] Form 13F, Instructions for Confidential Treatment Requests at p. 3, Item 2(g).

[69] *Id.* at p. 3, Item 4.

below, resulted in six to 16 managers per quarter receiving confidential treatment for a single holding over some part of a two-calendar year period. The other ongoing situation, also discussed below, involves a particular class of filer.

During our review, we obtained from IM a database listing of CTRs submitted between January 2008 and December 2009. Our review of this listing revealed that, for certain filers, there was no information showing whether the request had been granted or denied. Upon inquiry of the IM staff who maintain the database, we learned that a majority of the filers with missing status were holding securities of one particular issuer, and that IM had not officially granted or denied the CTRs submitted by these filers. We found that some CTRs pertaining to the securities of the issuer that had neither been granted nor denied dated back to March 2008. Most of the managers that requested confidential treatment for their position in the issuer filed *de novo* requests when the initial one-year period of confidential treatment requested was due to expire. In the absence of a written response to their quarterly requests, such managers received *de facto* confidential treatment. In some instances, such period of *de facto* confidential treatment was longer than one year.

During the review, IM officials provided us with details regarding their communications with the issuer, as well as IM's exploration of potential options to address the situation. Our review determined that these requests for confidential treatment did not meet the substantive criteria for granting a CTR. Therefore, based upon the applicable procedures and IM's own

guidance, we believe these requests should have been denied.

Another instance in which Form 13F filers received *de facto* confidential treatment involved a particular class of filer, certain large foreign institutional investment managers. The portfolios of these foreign managers generally consist of assets such as stocks, bonds, property or other financial instruments, and such managers generally invest on a global basis. Our review of IM's CTR database listing for the period from March 2008 to December 2009 revealed that IM had not granted or denied CTRs submitted by a particular large foreign institutional investment manager for its March, June and December 2009 filings, thus affording these filings some period of *de facto* confidential treatment.

IM staff explained to the OIG their work to date in analyzing the large foreign institutional investment manager's CTRs. Our review determined that such requests for confidential treatment under Section 13(f)(3) did not meet the substantive criteria for the granting of confidential treatment. Rather than denying the requests, however, IM did not respond to the requests in writing and, as a result, the foreign manager received *de facto* confidential treatment.

Recommendation 8:

The Division of Investment Management (IM), in consultation with the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that written requests for confidential treatment under Section 13(f) of the Securities Exchange Act of 1934

(particularly certain novel requests) are granted or denied within an appropriate timeframe, so that institutional investment managers are not afforded *de facto* confidential treatment as a result of IM not issuing a written response.

Management Comments. IM concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that IM concurred with this recommendation.

Recommendation 9:

The Division of Investment Management, in consultation with the Office of the General Counsel, the Office of International Affairs and the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that requests for relief under Section 13(f) of the Securities Exchange Act of 1934 made by certain large foreign institutional investment managers are addressed in a timely and appropriate manner.

Management Comments. IM concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that IM concurred with this recommendation.

Finding 9: Form 13F Does Not Currently Require Disclosure of All Significant Investment Activities of Institutional Investment Managers and Could Be Improved

The current Form 13F does not provide for the disclosure of all significant investment activities of institutional investment managers, and it could be improved to be more useful to the public.

Limitation on Securities Currently Required to be Reported Under Section 13(f)

The types of information and categories of investments required to be reported under Section 13(f) have not been updated since the enactment of that Section in 1975. The types of securities required to be reported under Section 13(f) include "exchange-traded (*e.g.*, NYSE, AMEX) or NASDAQ-quoted stocks, equity options and warrants, shares of closed-end investment companies, and certain convertible debt securities."[70] More sophisticated investment vehicles, such as derivatives or shares of open-end investment companies and mutual funds that might have been used to hedge equity securities, are not required to be reported on Form 13F. As a consequence, the public cannot obtain a complete picture of all significant investment activities of institutional investment managers.

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[70] Frequently Asked Questions, Question 7 at p. 3.

Aggregation of Securities Reported on Form 13F

Section 13(f) allows institutional investment managers to report securities over which the institutional investment managers have discretion in the aggregate, making Form 13F filings less helpful for users to analyze institutional investment managers' activities. According to IM's FAQs About Form 13F, an investment advisory firm that has sole investment discretion may aggregate all of its holdings in each issuer and report all of its holdings in a security in one entry on Form 13F.[71] An investment advisory firm may also aggregate its holdings on Form 13F if it shares investment discretion with someone that does not have independent obligation to file under Section 13(f).[72] According to a Risk Fin staff member, a requirement that institutional investment managers separately report holdings in proprietary accounts and holdings in customer accounts would provide the public with a more meaningful picture of the activities of institutional investment managers.

Average Positions in Section 13(f) Securities

Institutional investment managers are required to report Section 13(f) securities held at the end of a quarter. Hence, an institutional investment manager that purchased a significant amount of Section 13(f) securities after the beginning of a quarter, but disposed of them before the quarter end, would not be required to report those holdings. As a consequence,

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[71] *Id.*, Question 38 at p. 10.

[72] *Id.*, Question 38 at pp. 10-11.

the public does not have complete information about the activities of the institutional investment managers during a quarter and the effect of those activities on the market. A Risk Fin staff member noted that a simple way to fix this problem would be to add a requirement to Section 13(f) that would require the institutional investment managers to report average positions held in Section 13(f) securities during a quarter. This additional information would provide a clearer picture of the institutional investment managers' activities.

Increasing the Threshold for Section 13(f) Reporting

According to an IM attorney who reviewed the issue, the current Section 13(f) reporting threshold of $100 million is outdated as it does not reflect inflation and appreciation in securities since the inception of Section 13(f) in 1975. In 2006, at IM's request, Risk Fin (then the Office of Economic Analysis) performed an analysis of the impact of increasing the threshold required for Section 13(f) reporting from $100 million to an amount reflecting inflation. According to that analysis, a threshold of $300 million, which reflected inflation using the consumer price index, would result in a significant decrease in the number of institutional investment managers that would be required to file Form 13F, but a relatively modest decrease in the total dollar amount of assets covered. We believe that this analysis should be updated to determine whether an increase in the threshold amount should be pursued.

Aggregate Purchases and Sales of Section 13(f) Securities

Section 13(f)(1)(D) gives the Commission the authority to require institutional investment managers to report the aggregate purchases and aggregate sales of holdings in Section 13(f) securities during the reporting period.[73] However, the Commission currently has not adopted a rule to require the disclosure of aggregate purchases and sales of Section 13(f) securities. This additional disclosure would assist the public in better understanding the frequency and volume of trading activities of the institutional investment managers.

Recommendation 10:

The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation, the Office of the General Counsel and the Chairman's Office, should determine whether legislative changes to Section 13(f) of the Securities Exchange Act of 1934 should be sought, specifically with respect to expanding the definition of Section 13(f) securities, requiring separate reporting of securities held in proprietary accounts and customer accounts, reporting average positions in Section 13(f) securities, and increasing the Section 13(f) reporting threshold.

Management Comments. IM and Risk Fin concurred with this recommendation. See Appendix V for management's full comments.

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[73] 15 U.S.C. § 78m(f)(1)(D).

OIG Analysis. We are pleased that IM and Risk Fin concurred with this recommendation.

Recommendation 11:

The Division of Investment Management, in consultation with the Chairman's Office, should request that the Division of Risk, Strategy, and Financial Innovation update its analysis of the impact of increasing the reporting threshold of $100 million for Section 13(f) of the Securities Exchange Act of 1934.

Management Comments. IM and Risk Fin have concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased IM and Risk Fin concurred with this recommendation.

Recommendation 12:

The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation and the Chairman's Office, should determine whether to recommend to the Commission that it adopt a rule requiring institutional investment managers to report aggregate purchases and aggregate sales of securities required to be reported under Section 13(f) of the Securities Exchange Act of 1934.

Management Comments. IM and Risk Fin concurred with this recommendation. See Appendix V for management's full comments.

OIG Analysis. We are pleased that IM and Risk Fin concurred with this recommendation.

Appendix I

Acronyms

AMEX	American Stock Exchange
CTR	Confidential Treatment Request
CUSIP	Committee on Uniform Securities Identification Procedures
EDGAR	Electronic Database Gathering and Retrieval
Exchange Act	Securities Exchange Act of 1934
FAQs	Frequently Asked Questions
FOIA	Freedome of Information Act
FTP	File Transfer Protocol
IM	Division of Investment Management
NASDAQ	National Association of Securities Dealers Automated Quotations
NYSE	New York Stock Exchange
OCIE	Office of Compliance Inspections and Examinations
OGC	Office of the General Counsel
OIG	Office of Inspector General
OIT	Office of Information Technology
Risk Fin	Division of Risk, Strategy, and Financial Innovation
RM	Records Management Branch
SAS	Statement of Auditing Standards
SEC or Commission	U.S. Securities and Exchange Commission
XBRL	Extensible Business Reporting Language
XML	Extensible Markup Language

Appendix II

Scope and Methodology

This review was not conducted in accordance with the government auditing standards.

Scope. The scope of this review covered the period from January 2008 to December 2009, and included a review of Congress's intent in enacting Section 13(f) of the Exchange Act, the reporting process for Section 13(f), the Form 13F filings and requests for confidential treatment of information reported on Form 13F. We obtained from IM a listing of CTRs from January 2008 to December 2009, information concerning IM's internal procedures for processing CTRs, and other information necessary to determine whether the CTRs were being properly processed. We conducted our fieldwork from May 2010 to June 2010.

Methodology. To meet the objectives to examine whether the Commission's implementation of and current practices under Section 13(f) meet Congress's intent in establishing Section 13(f); determine whether the reporting of entities covered under Section 13(f) is appropriately designed to comply with the statutory requirements; and determine whether the Commission's policies and procedures for reviewing and processing requests for confidential treatment of information required to be reported under Section 13(f) are adequate and appropriate, the OIG conducted a survey of IM staff members who have duties or responsibilities pertaining to Section 13(f). We then interviewed the IM staff responsible for executing policies and procedures with respect to Section 13(f),

primarily including the processing of CTRs. We also interviewed staff in Risk Fin and OCIE regarding the Section 13(f) reporting process, and RM staff regarding the procedures pertaining to CTR files. Additionally, we reviewed IM's procedures for processing CTRs. We selected and tested a sample of CTRs that were processed by IM to determine if IM adhered to the applicable rules and regulations in affording confidential treatment to the Section 13(f) filings of institutional investment managers.

Internal or Management Controls. We reviewed internal and management controls as they pertained to the objectives of our review.

Use of Computer-Processed Data. We relied on data from the SEC's EDGAR system, which included the name of the filer and Form 13F data for a selected sample of CTRs. The EDGAR system does not process any of the data contained in the Form 13F filings, but rather only stores the filings in electronic format. As a result, we considered the relevant risks to be:

- An EDGAR system failure to receive or retain a Form 13F filing from an issuer; and

- Information security risks related to whether Form 13F information in the EDGAR system could be compromised.

We considered the risk surrounding information security and noted that, in November 2007, OIT certified and accredited the EDGAR system, as required by the Federal Information Security Management Act of 2002. Therefore, we concluded that

we could rely upon the information in the EDGAR system as it pertains to information security.

We also relied on IM's internal database listing for CTRs. We performed testing of the database listing for accuracy and completeness by comparing information in the database listing to information contained in source documents, such as Forms 13F and CTR letters.

Judgmental Sampling. IM provided us with a list of CTRs submitted under Section 13(f) for the period from January 2008 to December 2009, which included approximately 446 CTRs. We determined that a sample size of 25 (5.6 percent) was reasonable for the purposes of our testing.

Appendix III

Criteria

Section 13(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(f). Established a reporting requirement for securities holdings of institutional investment managers in order to increase the public availability of information regarding the securities holdings of institutional investors. Requires this data to be made publicly available unless the Commission prevents or delays disclosure as necessary or appropriate in the public interest to protect investors. Enacted by Public Law 94-29, the Securities Acts Amendments of 1975, on June 4, 1975.

Voluntary Services Prohibition of the Antideficiency Act, 31 U.S.C. § 1342. Prohibits a U.S. Government officer or employee from accepting voluntary services except for emergencies involving the safety of human life or the protection of property.

Report of the Senate Committee on Banking, Housing and Urban Affairs, Senate Report No. 94-75, 94th Cong., 1st Sess. (Apr. 14, 1975), reprinted in 1975 U.S.C.C.A.N. 179. Contains the legislative history for Section 13(f) of the Exchange Act.

Commission Rule13f-1, 17 C.F.R. § 240.13f-1, Reporting by Institutional Investment Managers of Information with Respect to Accounts Over Which They Exercise Investment Discretion. Requires quarterly reporting of institutional investment managers that exercise investment

discretion of securities holdings of $100 million or more on Form 13F. Initially adopted on June 15, 1978, and revised on January 5, 1979, and January 12, 1999.

Commission Rule 24b-2, 17 C.F.R. § 240.24b-2, Nondisclosure of Information Filed with the Commission and with Any Exchange. Specifies the procedure for requesting confidential treatment of information required to be filed with the Commission under the Exchange Act. Provides that the procedure set forth in the rule is the exclusive procedure for requesting confidential treatment of information required to be filed under the Exchange Act. Initially adopted on April 28, 1976, and revised on February 23, 1993, June 9, 1995, September 7, 1995, and May 31, 1996.

Commission Rule of Organization 30-5(c)(1) and (2), 17 C.F.R. § 200.30-5(c)(1) and (2), Delegation of Authority to Director of Division of Investment Management. Delegates authority to the Director of IM to grant and deny applications for confidential treatment of information filed pursuant to Section 13(f) and Rule 13f-1 thereunder, and to revoke a grant of confidential treatment for any such application. Added on February 5, 1981.

Instructions for Form 13F, Information Required of Institutional Investment Managers Pursuant to Section 13(f) of the Securities Exchange Act of 1934 and Rules Thereunder. Contains both general instructions for filing Form 13F and instructions for CTRs submitted under Form 13F. Initially adopted on June 15, 1978, and revised on January 5, 1979, June 28, 1979, and May 14, 1985, and January 12, 1999.

Division of Investment Management Frequently Asked Questions About Form 13F, May 2005. Contains the staff's views on frequently asked questions to assist institutional investment managers that are required to file Form 13F.

Letter from Douglas Scheidt, Associate Director and Chief Counsel, Division of Investment Manager to Section 13(f) Confidential Treatment Filers. Discusses IM's position regarding Form 13F confidential treatment requests. Issued on June 17, 1998.

Appendix IV

List of Recommendations

Recommendation 1:

The Chairman's Office should delegate primary responsibility for reviewing and analyzing Form 13F information to the appropriate division or office.

Recommendation 2:

The Chairman's Office should assign to the appropriate divisions or offices responsibility for monitoring Section 13(f) filings for accuracy and completeness in order to limit the errors in or problems with the filings and thereby enhance the usefulness and reliability of the data.

Recommendation 3:

The Division of Investment Management and the Office of Information Technology should renew the efforts that were begun in 2005 and implement checks in the Electronic Data Gathering and Retrieval (EDGAR) system that will detect and/or correct obvious errors contained in the Forms 13F that are uploaded in EDGAR.

Recommendation 4:

The Division of Investment Management, in consultation with the Chairman's Office, should work with the Office of Information Technology and update Form 13F to a more structured format, such as

Extensible Markup Language (XML), to make it easier for users and researchers to extract and analyze Section 13(f) data.

Recommendation 5:

The Chairman's Office should assign to an appropriate division and/or office responsibility for reviewing the official list of Section 13(f) securities that is prepared by a third party each quarter and testing the list for accuracy and completeness on a sample basis.

Recommendation 6:

The Division of Investment Management, in consultation with the Office of Administrative Services and the Chairman's Office, should ensure that the Securities and Exchange Commission (SEC) enters into a formal contract or agreement with the third party that prepares the official list required by Section 13(f)(3) of the Securities Exchange Act of 1934. This contract or agreement should document the third party's responsibilities for providing the official list on a quarterly basis and explicitly state that the SEC has no financial obligation and the firm has no expectation of payment from the government.

Recommendation 7:

The Division of Investment Management and the Records Management Branch should modify their respective policies and procedures to ensure that files for the processing of confidential treatment requests under Section 13(f) of the Securities Exchange Act of 1934 are properly maintained and retained in accordance with the applicable record retention

schedule, and should ensure that the established policies and procedures are followed.

Recommendation 8:

The Division of Investment Management (IM), in consultation with the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that written requests for confidential treatment under Section 13(f) of the Securities Exchange Act of 1934 (particularly certain novel requests) are granted or denied within an appropriate timeframe, so that institutional investment managers are not afforded *de facto* confidential treatment as a result of IM not issuing a written response.

Recommendation 9:

The Division of Investment Management, in consultation with the Office of the General Counsel, the Office of International Affairs and the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that requests for relief under Section 13(f) of the Securities Exchange Act of 1934 made by certain large foreign institutional investment managers are addressed in a timely and appropriate manner.

Recommendation 10:

The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation, the Office of the General Counsel and the Chairman's Office, should determine whether legislative changes to Section 13(f) of the

Securities Exchange Act of 1934 should be sought, specifically with respect to expanding the definition of Section 13(f) securities, requiring separate reporting of securities held in proprietary accounts and customer accounts, reporting average positions in Section 13(f) securities, and increasing the Section 13(f) reporting threshold.

Recommendation 11:

The Division of Investment Management, in consultation with the Chairman's Office, should request that the Division of Risk, Strategy, and Financial Innovation update its analysis of the impact of increasing the reporting threshold of $100 million for Section 13(f) of the Securities Exchange Act of 1934.

Recommendation 12:

The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation and the Chairman's Office, should determine whether to recommend to the Commission that it adopt a rule requiring institutional investment managers to report aggregate purchases and aggregate sales of securities required to be reported under Section 13(f) of the Securities Exchange Act of 1934.

Appendix V

Management Comments

MEMORANDUM

TO: H. David Kotz
Inspector General

FROM: Kayla J. Gillan [/s/ Kayla J. Gillan]
Deputy Chief of Staff, Office of the Chairman

DATE: September 24, 2010

SUBJECT: Response to Report No. 480, *Review of the SEC's Section 13(f) Reporting Requirements*

This memorandum is in response to the Office of Inspector General's Draft Report No. 480, entitled *Review of the SEC's Section 13(f) Reporting Requirements*. We appreciate the work of the Office of Inspector General (OIG) in reviewing the Commission's program and processes with regard to Section 13(f) of the Securities Exchange Act of 1934.

Section 13(f), which provides for the public availability of information regarding the securities holdings of certain institutional investors, is a vital part of the SEC's full disclosure program. The data that is provided by institutional investors on Form 13F is extraordinarily valuable to investors and other financial market participants. We welcome the OIG's focus on this important topic, and appreciate the

Report's recommendations for ensuring the effectiveness of the agency's program to implement Section 13(f).

The purpose of this memorandum is to comment on the three recommendations that the Report directs to the Office of the Chairman.

Recommendation 1: *The Chairman's Office should delegate primary responsibility for reviewing and analyzing Form 13F information to the appropriate division or office.*

We concur with this recommendation. While the Report acknowledges the variety of important ways in which SEC staff make use of Form 13F data, including to support the agency's enforcement and rulemaking activities, we agree that it would be beneficial to clarify the appropriate roles and responsibilities with regard to data provided under Section 13(f), including identification of a primary office responsible for reviewing and analyzing Form 13F information.

To implement the recommendation, we will work with the relevant SEC offices, including the Division of Investment Management, Division of Corporation Finance, Division of Risk, Strategy, and Financial Innovation, and Office of Compliance Inspections and Examinations, to assist in identifying and delineating the appropriate scope of responsibilities with respect to Section 13(f), and will consult with the Office of General Counsel as to whether formal Commission action would be required to execute any new or amended responsibilities.

Recommendation 2: *The Chairman's Office should assign to the appropriate divisions or offices responsibility for monitoring Section 13(f) filings for accuracy and completeness in order to limit the errors in or problems with the filings, thereby enhancing the usefulness and reliability of the data.*

We concur with this recommendation. In taking the actions described in the response to Recommendation 1, we will include a specific focus on the responsibility for monitoring of Section 13(f) filings. Since there are approximately 3,000 to 4,000 Form 13Fs filed each quarter, we appreciate the OIG's acknowledgement that any actions that might be considered in connection with enhanced monitoring of Form 13F filings need not entail "cumbersome and time-consuming" reviews of each filing. We will also give particular attention to the specific suggestions made by the OIG to provide for more systematic monitoring of Form 13F, such as consideration of a pilot program or other initiative on a test basis.

Recommendation 5: *The Chairman's Office should assign to an appropriate division and/or office responsibility for reviewing the official list of Section 13(f) securities that is prepared quarterly by a third party and test it on a sample basis.*

We concur with this recommendation. In taking the actions described in the response to Recommendation 1, we will include a specific focus on office responsibilities with respect to the "Official List of Section 13(f) Securities" that is posted on the SEC's website. We agree that it is important that the official list be up-to-date and accurate, since institutional investment managers rely on it in preparing their 13F

reports. In addition, as the SEC moves forward to implement Recommendation 6, which recommends that the SEC enter into a formal contract or agreement with the third party that prepares the list, it will provide an appropriate opportunity for the SEC, acting through our Office of Acquisitions, to obtain assurances with respect to the quality and reliability of the data provided.

Thank you, again, for your focus on these important topics, and for the OIG's work on this audit. Please don't hesitate to contact me if you have any questions.

Memorandum

To: H. David Kotz
From: Andrew Donohue; Douglas Scheidt; David Grim; Stephan Packs
Date: September 24, 2010
Re: Division of Investment Management Response to the Office of Inspector General's Report No. 480 – Review of SEC's Section 13(f) Reporting Requirements

This memorandum is in response to the Office of Inspector General's Report No. 480. Thank you for the opportunity to respond to the report. We concur with the recommendations of the report insofar as they pertain to the Division of Investment Management ("IM"), and add the following comments.

We are pleased that the OIG found that, "IM has put in place well constructed review procedures for processing CTRs."

In addition, we concur with the Risk Fin comments on the report. In particular, we agree that consideration of significant changes to Form 13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, rather than in isolation, and that it may not be possible to undertake a review of the necessary scope immediately. IM will play an important role in this coordinated review. Although as the OIG report recognizes IM's delegated authority with respect to section 13(f) is limited to consideration of confidential treatment requests under the section, IM has experience that is relevant to each of the recommendations in the report. We look forward to

collaborating with our colleagues on the staff who possess relevant expertise in implementing the recommendations.

Our comments on the specific recommendations are described below.

Recommendation 1: The Chairman's Office should delegate primary responsibility for reviewing and analyzing Form 13F information to the appropriate division or office.

IM Comments: Because this is a recommendation for the Chairman's Office, we defer to its judgment. We concur with the Risk Fin comments as they relate to this recommendation, particularly the discussion of how the Commission staff currently does use Section 13(f) information in a number of important ways.

Recommendation 2: The Chairman's Office should assign to the appropriate divisions or offices responsibility for monitoring Section 13(f) filings for accuracy and completeness in order to limit the errors in or problems with the filings and thereby enhance the usefulness and reliability of the data.

IM Comments: Because this is a recommendation for the Chairman's Office, we defer to its judgment.

Recommendation 3: The Division of Investment Management and the Office of Information Technology should renew the efforts that were begun in 2005 and implement checks in the Electronic Data Gathering and Retrieval (EDGAR) system that will detect and/or correct obvious errors contained in the Forms 13F that are uploaded in EDGAR.

IM Comments: We concur with this recommendation.

Recommendation 4: The Division of Investment Management, in consultation with the Chairman's Office, should work with the Office of Information Technology and update Form 13F to a more structured format, such as Extensible Markup Language (XML), to make it easier for users and researchers to extract and analyze Section 13(f) data.

IM Comments: We concur with this recommendation. IM will share its relevant experience in collaborating with the Chairman's Office and the Office of Information Technology to implement this recommendation. Per Risk Fin's comments, we also will benefit from their expertise on these issues.

Recommendation 5: The Chairman's Office should assign to an appropriate division and/or office responsibility for reviewing the official list of Section 13(f) securities that is prepared by a third party each quarter and testing the list for accuracy and completeness on a sample basis.

IM Comments: Because this is a recommendation for the Chairman's Office, we defer to its judgment.

Recommendation 6: The Division of Investment Management, in consultation with the Office of Administrative Services and the Chairman's Office, should ensure that the Securities and Exchange Commission (SEC) enters into a formal contract or agreement with the third party that prepares the official list required by Section 13(f)(3) of the Securities Exchange Act of 1934. This contract or agreement should document the third party's responsibilities for

providing the official list on a quarterly basis and explicitly state that the SEC has no financial obligation and the firm has no expectation of payment from the government.

IM Comments: We concur with this recommendation. IM will share its relevant experience in collaborating with the Office of Administrative Services and the Chairman's Office to implement this recommendation.

Recommendation 7: The Division of Investment Management and the Records Management Branch should modify their respective policies and procedures to ensure that files for the processing of confidential treatment requests under Section 13(f) of the Securities Exchange Act of 1934 are properly maintained and retained in accordance with the applicable record retention schedule, and should ensure that the established policies and procedures are followed.

IM Comments: We concur with this recommendation. IM has already begun coordinating with Records Management on modifying the relevant policies and procedures.

Recommendation 8: The Division of Investment Management (IM), in consultation with the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that written requests for confidential treatment under Section 13(f) of the Securities Exchange Act of 1934 (particularly certain novel requests) are granted or denied within an appropriate timeframe, so that institutional investment managers are not afforded *de facto*

confidential treatment as a result of IM not issuing a written response.

IM Comments: We concur with this recommendation. As the OIG recognizes, IM has well constructed review procedures for processing CTRs. In the cases at issue in recommendation 8, IM has expended substantial resources in analyzing novel, complicated issues that go beyond the issues that typically are the subject of a Form 13F CTR. IM has and will continue to act prudently and appropriately in attempting to resolve these matters, focusing on ensuring that no filer is afforded unwarranted *de facto* confidential treatment.

Recommendation 9: The Division of Investment Management, in consultation with the Office of the General Counsel, the Office of International Affairs and the Chairman's Office, as necessary, should take appropriate steps to improve its policies and procedures to ensure that requests for relief under Section 13(f) of the Securities Exchange Act of 1934 made by certain large foreign institutional investment managers are addressed in a timely and appropriate manner.

IM Comments: We concur with this recommendation. As the OIG recognizes, IM has well constructed review procedures for processing CTRs. In the cases at issue in recommendation 9, IM has expended substantial resources in analyzing novel, complicated issues that go beyond the issues that typically are the subject of a Form 13F CTR. IM has and will continue to act prudently and appropriately in attempting to resolve these matters, focusing on ensuring that no filer is afforded unwarranted *de facto* confidential treatment.

Recommendation 10: The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation, the Office of the General Counsel and the Chairman's Office, should determine whether legislative changes to Section 13(f) of the Securities Exchange Act of 1934 should be sought, specifically with respect to expanding the definition of Section 13(f) securities, requiring separate reporting of securities held in proprietary accounts and customer accounts, reporting average positions in Section 13(f) securities, and increasing the Section 13(f) reporting threshold.

IM Comments: We concur with this recommendation. IM will share its relevant experience in collaborating with Risk Fin, OGC, and the Chairman's Office to implement this recommendation. We also concur with the Risk Fin comments as they relate to this recommendation. In particular, we emphasize that consideration of significant changes to Form 13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, rather than in isolation, and that it may not be possible to undertake a review of the necessary scope immediately.

Recommendation 11: The Division of Investment Management, in consultation with the Chairman's Office, should request that the Division of Risk, Strategy, and Financial Innovation update its analysis of the impact of increasing the reporting threshold of $100 million for Section 13(f) of the Securities Exchange Act of 1934.

IM Comments: We concur with this recommendation. IM will share its relevant experience in collaborating

with the Chairman's Office and Risk Fin to implement this recommendation. We also concur with the Risk Fin comments as they relate to this recommendation. In particular, we emphasize that consideration of significant changes to Form 13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, rather than in isolation, and that it may not be possible to undertake a review of the necessary scope immediately.

Recommendation 12: The Division of Investment Management, in consultation with the Division of Risk, Strategy, and Financial Innovation and the Chairman's Office, should determine whether to recommend to the Commission that it adopt a rule requiring institutional investment managers to report aggregate purchases and aggregate sales of securities required to be reported under Section 13(f) of the Securities Exchange Act of 1934.

IM Comments: We concur with this recommendation. IM will share its relevant experience in collaborating with Risk Fin and the Chairman's Office to implement this recommendation. We also concur with the Risk Fin comments as they relate to this recommendation. In particular, we emphasize that consideration of significant changes to Form 13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, rather than in isolation, and that it may not be possible to undertake a review of the necessary scope immediately.

MEMORANDUM

TO: H. David Kotz, Inspector General

FROM: Henry Hu [/s/ H. H.], Director, Division of Risk, Strategy, and Financial Innovation

DATE: September 17, 2010

RE: Draft *Review of the SEC's Section 13(f) Reporting Requirements* (Report No 480)

Thank you for the opportunity to review the September 2 "formal draft" of the *Review of the SEC's Section 13(f) Reporting Requirements*. We appreciate, in particular, your taking into account many of the comments we provided previously to your staff. We concur in the recommendations of the report insofar as they pertain to the Division of Risk, Strategy, and Financial Innovation (Risk Fin), and add the following comments.

Risk Fin has assumed the structured data responsibilities of the former Office of Interactive Data and so will assist the Division of Investment Management (IM) in working with the Office of Information Technology as contemplated by Recommendation 4.[1]

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[1] In this regard, we point out that the last paragraph on page 14 could be misread to imply that the XBRL initiative somehow conflicted with the goal of structuring 13F data. In fact, the XBRL work already completed in connection with mutual fund holdings reporting substantially overlaps with the 13F structured data initiative contemplated by Recommendation 4, and means that most of this work is actually already done.

Staff of our Division, notably our economists, make extensive use of Section 13(f) data. The examples you have included in the Report reflect that these data are used extensively in our support of both the SEC's enforcement and rulemaking activities. As to Recommendations 10, 11, and 12, we believe that consideration of significant changes to Form 13F should be part of a coordinated review of the overall SEC system for disclosing ownership and transactions in the securities of public companies, rather than in isolation. You will understand that it may not be possible to undertake a review of the necessary scope immediately.

Once again, I want to thank you and your staff for your careful work on this report. Please don't hesitate to contact me if I can provide further clarification.

MEMORANDUM

September 16, 2010

TO: H. David Kotz,
Inspector General

FROM: Sharon Sheehan [/s/ Sharon Sheehan]
Associate Executive Director
Office of Administrative Services

SUBJECT: OAS Management Response to Draft Report No. 480, *Review of the SEC's Section 13(f) Reporting Requirements*

This memorandum is in response to the Office of Inspector General's Draft Report No. 480, *Review of the SEC's Section 13(f) Reporting Requirements*. Thank you for the opportunity to review and respond to this report. We concur with the recommendation addressed to OAS.

Recommendation 6:

OAS concurs. We view our role in implementing the recommendation as support to IM. Once a requirements document and proper RQ are submitted to OAS Office of Acquisitions, we will work with IM to execute a formal contract or agreement for the required services.

Appendix VI

OIG Response to Management's Comments

The Office of Inspector General is pleased that the Chairman's Office, the Division of Investment Management, the Division of Risk, Strategy, and Financial Innovation, the Office of Administrative Services, the Office of Information Technology, the Office of FOIA and Records Management Services, and the Office of International Affairs concurred with all of the report's 12 recommendations. We believe that the implementation of these recommendations will result in significant improvements to the Section 13(f) reporting program and will ensure that, consistent with the intent of Congress in enacting Section 13(f), the investing public is provided with reliable and accurate information regarding the investment activities of institutional investment managers and the Form 13F data is fully utilized for a variety of regulatory purposes. We are pleased that the relevant SEC Offices and Divisions have agreed to work together to implement our recommendations and to ensure the effectiveness of the Section 13(f) program.

Audit Requests and Ideas

The Office of Inspector General welcomes your input. If you would like to request an audit in the future or have an audit idea, please contact us at:

U.S. Securities and Exchange Commission
Office of Inspector General
Attn: Assistant Inspector General, Audits (Audit Requests/Ideas)
100 F Street, N.E.
Washington D.C. 20549

Tel. #: 202-551-6061
Fax #: 202-772-9265
Email: oig@sec.gov

Hotline

To report fraud, waste, abuse, and mismanagement at SEC, contact the Office of Inspector General at:

Phone: 877.442.0854

Web-Based Hotline Complaint Form:
www.reportlinewcb.com/sec_oig

APPENDIX F

U.S. Const. amend I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

15 U.S.C.A. § 78m

(f) Reports by institutional investment managers

(1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) of this section having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100,000,000 or such lesser amount (but in no case less than $10,000,000) as the Commission, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. Such reports may also include for accounts (in

aggregate or by type) with respect to which the institutional investment manager exercises investment discretion such of the following information as the Commission, by rule, prescribes--

(A) the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value or cost or amortized cost of each other security (other than an exempted security) held on the last day of the reporting period by such accounts;

(B) the aggregate fair market value or cost or amortized cost of exempted securities (in aggregate or by class) held on the last day of the reporting period by such accounts;

(C) the number of shares of each equity security of a class described in subsection (d)(1) of this section held on the last day of the reporting period by such accounts with respect to which the institutional investment manager possesses sole or shared authority to exercise the voting rights evidenced by such securities;

(D) the aggregate purchases and aggregate sales during the reporting period of each security (other than an exempted security) effected by or for such accounts; and

(E) with respect to any transaction or series of transactions having a market value of at least $500,000 or such other amount as the Commission, by rule, may determine, effected during the reporting period by or for such accounts in any

equity security of a class described in subsection (d)(1) of this section--

(i) the name of the issuer and the title, class, and CUSIP number of the security;

(ii) the number of shares or principal amount of the security involved in the transaction;

(iii) whether the transaction was a purchase or sale;

(iv) the per share price or prices at which the transaction was effected;

(v) the date or dates of the transaction;

(vi) the date or dates of the settlement of the transaction;

(vii) the broker or dealer through whom the transaction was effected;

(viii) the market or markets in which the transaction was effected; and

(ix) such other related information as the Commission, by rule, may prescribe.

(2) The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of

the reporting period. At a minimum, such public disclosure shall occur every month.

(3) The Commission, by rule, or order, may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder.

(4) The Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in subsection (d)(1) of this section, updated no less frequently than reports are required to be filed pursuant to paragraph (1) of this subsection. The Commission shall tabulate the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public. Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with section 552 of Title 5. Notwithstanding the preceding sentence, any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

(5) In exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets or, in granting an exemption, that its action is consistent with the protection of investors and the purposes of this subsection. In exercising such authority the Commission shall take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the appropriate regulatory agencies, Federal and State authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection, national securities exchanges, and registered securities associations, (A) to achieve uniform, centralized reporting of information concerning the securities holdings of and transactions by or for accounts with respect to which institutional investment managers exercise investment discretion, and (B) consistently with the objective set forth in the preceding subparagraph, to avoid unnecessarily duplicative reporting by, and minimize the compliance burden on, institutional investment managers. Federal authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection shall cooperate with the Commission in the performance of its responsibilities under the preceding sentence. An institutional investment manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C.A. § 1811 et seq.], shall file with the appropriate regulatory agency a copy of every

report filed with the Commission pursuant to this subsection.

(6)(A) For purposes of this subsection the term "institutional investment manager" includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

(B) The Commission shall adopt such rules as it deems necessary or appropriate to prevent duplicative reporting pursuant to this subsection by two or more institutional investment managers exercising investment discretion with respect to the same amount.

APPENDIX H

17 C.F.R § 240.13f-1

Reporting by institutional investment managers of information with respect to accounts over which they exercise investment discretion.

(a)(1) Every institutional investment manager which exercises investment discretion with respect to accounts holding section 13(f) securities, as defined in paragraph (c) of this section, having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100,000,000 shall file a report on Form 13F (§ 249.325 of this Chapter) with the Commission within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year.

(2) An amendment to a Form 13F (§ 249.325 of this chapter) report, other than one reporting only holdings that were not previously reported in a public filing for the same period, must set forth the complete text of the Form 13F. Amendments must be numbered sequentially.

(b) For the purposes of this rule, "investment discretion" has the meaning set forth in section 3(a)(35) of the Act (15 U.S.C. 78c(a)(35)). An institutional investment manager shall also be deemed to exercise "investment discretion" with respect to all

accounts over which any person under its control exercises investment discretion.

(c) For purposes of this rule "section 13(f) securities" shall mean equity securities of a class described in section 13(d)(1) of the Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. In determining what classes of securities are section 13(f) securities, an institutional investment manager may rely on the most recent list of such securities published by the Commission pursuant to section 13(f)(3) of the Act (15 U.S.C. 78m(f)(3)). Only securities of a class on such list shall be counted in determining whether an institutional investment manager must file a report under this rule (240.13f-1(a)) and only those securities shall be reported in such report. Where a person controls the issuer of a class of equity securities which are "section 13(f) securities" as defined in this rule, those securities shall not be deemed to be "section 13(f) securities" with respect to the controlling person, provided that such person does not otherwise exercise investment discretion with respect to accounts with fair market value of at least $100,000,000 within the meaning of paragraph (a) of this section.

APPENDIX I

OMB APPROVAL	
OMB Number:	3235-0006
Expires:	December 31, 2009
Estimated average burden hours per response	22.6

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 13F

INFORMATION REQUIRED OF INSTITUTIONAL INVESTMENT MANAGERS PURSUANT TO SECTION 13(f) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULES THEREUNDER

GENERAL INSTRUCTIONS

1. Rule as to Use of Form 13F. Institutional investment managers ("Managers") must use Form 13F for reports to the Commission required by Section 13(f) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(f)] ("Exchange Act") and rule 13f-1 [17 CFR 240.13f-1] thereunder. Rule 13f-1(a) provides that every Manager which exercises investment discretion with respect to accounts holding Section 13(f) securities, as defined in rule 13f-

1(c), having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100,000,000 shall file a report on Form 13F with the Commission within 45 days after the last day of such calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year.

2. Rules to Prevent Duplicative Reporting. If two or more Managers, each of which is required by rule 13f-1 to file a report on Form 13F for the reporting period, exercise investment discretion with respect to the same securities, only one such Manager must include information regarding such securities in its reports on Form 13F.

A Manager having securities over which it exercises investment discretion that are reported by another Manager (or Managers) must identify the Manager(s) reporting on its behalf in the manner described in Special Instruction 6.

A Manager reporting holdings subject to shared investment discretion must identify the other Manager(s) with respect to which the filing is made in the manner described in Special Instruction 8.

3. Filing of Form 13F. A Manager must file a Form 13F report with the Commission within 45 days after the end of each calendar year and each of the first three calendar quarters of each calendar year. As required by Section 13(f)(4) of

the Exchange Act, a Manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act, must file with the appropriate regulatory agency for the bank a copy of every Form 13F report filed with the Commission pursuant to this subsection by or with respect to such bank. Filers who file Form 13F electronically can satisfy their obligation to file with other regulatory agencies by sending (a) a paper copy of the EDGAR filing (provided the Manager removes or blanks out the confidential access codes); (b) the filing in electronic format, if the regulatory agency with which the filing is being made has made provisions to receive filings in electronic format; or (c) for filers filing in paper format under continuing hardship exemptions, a copy of the Form 13F paper filing.

4. Official List of Section 13(f) Securities. The official list of Section 13(f) Securities published by the Commission (the "13F List") lists the securities the holdings of which a Manager is to report on Form 13F. See rule 13f-1(c) [17 CFR 240.13f-1(c)]. Form 13F filers may rely on the current 13F List in determining whether they need to report any particular securities holding. Paper copies are available at a reasonable fee from the Securities and Exchange Commission, Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

INSTRUCTIONS FOR CONFIDENTIAL TREATMENT REQUESTS

Pursuant to Section 13(f)(3) of the Exchange Act [15 U.S.C. 78m(f)(3)], the Commission (1) may prevent or delay public disclosure of information reported on this form in accordance with Section 552 of Title 5 of the United States Code, the Freedom of Information Act [5 U.S.C. 552], and (2) shall not disclose information reported on this form identifying securities held by the account of a natural person or an estate or trust (other than a business trust or investment company). A Manager must submit in accordance with the procedures for requesting confidential treatment any portion of a report which contains information identifying securities held by the account of a natural person or an estate or trust (other than a business trust or investment company).

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

SEC1685 (10-03)

A Manager should make requests for confidential treatment of information reported on this form in accordance with rule 24b-2 under the Exchange Act [17 CFR 240.24b-2]. Requests relating to the non-disclosure of information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) must so state but need not, in complying with paragraph (b)(2)(ii) of rule 24b-2, include an

analysis of any applicable exemptions from disclosure under the Commission's rules and regulations adopted under the Freedom of Information Act [17 CFR 200.80].

Paragraph (b) of rule 24b-2 requires a Manager filing confidential information with the Commission to indicate at the appropriate place in the public filing that the confidential portion has been so omitted and filed separately with the Commission. A Manager should comply with this provision by including on the Summary Page, after the Report Summary and prior to the List of Other Included Managers, a statement that confidential information has been omitted from the public Form 13F report and filed separately with the Commission.

A Manager must file in paper, in accordance with rule 101(c)(1)(i) of Regulation S-T [17 CFR 232.101(c)(1)(i)], all requests for and information subject to the request for confidential treatment filed pursuant to Section 13(f)(3) of the Exchange Act. If a Manager requests confidential treatment with respect to information required to be reported on Form 13F, the Manager must file in paper with the Secretary of the Commission an original and four copies of the Form 13F reporting information for which the Manager requests confidential treatment.

A Manager requesting confidential treatment must provide enough factual support for its request to enable the Commission to make an informed judgment as to the merits of the request. The request should address all pertinent factors, including all of the following that are relevant:

1. If confidential treatment is requested as to more than one holding of securities, discuss each holding separately unless the Manager can identify a class or classes of holdings as to which the nature of the factual circumstances and the legal analysis are substantially the same.

2. If a request for confidential treatment is based upon a claim that the subject information is confidential, commercial or financial information, provide the information required by paragraphs 2.a through 2.e of this Instruction except that, if the subject information concerns security holdings that represent open risk arbitrage positions and no previous requests for confidential treatment of those holdings have been made, the Manager need provide only the information required in paragraph 2.f.

   a. Describe the investment strategy being followed with respect to the relevant securities holdings, including the extent of any program of acquisition and disposition (note that the term "investment strategy," as used in this instruction, also includes activities such as block positioning).

   b. Explain why public disclosure of the securities would, in fact, be likely to reveal the investment strategy; consider this matter in light of the specific reporting requirements of Form 13F (e.g., securities holdings are reported only quarterly and may be aggregated in many cases).

c. Demonstrate that such revelation of an investment strategy would be premature; indicate whether the Manager was engaged in a program of acquisition or disposition of the security both at the end of the quarter and at the time of the filing; and address whether the existence of such a program may otherwise be known to the public.

d. Demonstrate that failure to grant the request for confidential treatment would be likely to cause substantial harm to the Manager's competitive position; show what use competitors could make of the information and how harm to the Manager could ensue.

e. State the period of time for which confidential treatment of the securities holdings is requested. The time period specified may not exceed one (1) year from the date that the Manager is required to file the Form 13F report with the Commission.

f. For securities holdings that represent open risk arbitrage positions, the request must include good faith representations that:

   i. the securities holding represents a risk arbitrage position open on the last day of the period for which the Form 13F report is filed; and

   ii. the reporting Manager has a reasonable belief as of the period end that it may not close the entire position on or before the

date that the Manager is required to file the Form 13F report with the Commission.

If the Manager makes these representations in writing at the time that the Form 13F is filed, the Commission will automatically accord the subject securities holdings confidential treatment for a period of up to one (1) year from the date that the Manager is required to file the Form 13F report with the Commission.

g. At the expiration of the period for which confidential treatment has been granted pursuant to paragraph 2.e or 2.f of this Instruction (the "Expiration Date"), the Commission, without additional notice to the reporting manager, will make such security holdings public unless a de novo request for confidential treatment of the information that meets the requirements of paragraphs 2.a through 2.e of this Instruction is filed with the Commission at least fourteen (14) days in advance of the Expiration Date.

3. If the Commission grants a request for confidential treatment, it may delete details which would identify the Manager and use the information in tabulations required by Section 13(f)(3) absent a separate showing that such use of information could be harmful.

4. Upon the denial by the Commission of a request for confidential treatment, or upon the expiration of the confidential treatment

previously granted for a filing, unless a hardship exemption is available, the Manager must submit electronically, within six (6) business days of the expiration or notification of the denial, as applicable, a Form 13F report, or an amendment to its publicly filed Form 13F report, if applicable, listing those holdings as to which the Commission denied confidential treatment or for which confidential treatment has expired. If a Manager files an amendment, the amendment must not be a restatement; the Manager must designate it as an amendment which adds new holdings entries. The Manager must include at the top of the Form 13F Cover Page the following legend to correctly designate the type of filing being made:

THIS FILING LISTS SECURITIES HOLDINGS REPORTED ON THE FORM 13F FILED ON (DATE) PURSUANT TO A REQUEST FOR CONFIDENTIAL TREATMENT AND FOR WHICH (THAT REQUEST WAS DENIED/CONFIDENTIAL TREATMENT EXPIRED) ON (DATE).

SPECIAL INSTRUCTIONS

1. This form consists of three parts: the Form 13F Cover Page (the "Cover Page"), the Form 13F Summary Page (the "Summary Page"), and the Form 13F Information Table (the "Information Table").

2. When preparing the report, omit all bracketed text. Include brackets used to form check boxes.

The Cover Page:

3. The period end date used in the report (and in the EDGAR submission header) is the last day of the calendar year or quarter, as appropriate, even though that date may not be the same as the date used for valuation in accordance with Special Instruction 9.

4. Amendments to a Form 13F report must either restate the Form 13F report in its entirety or include only holdings entries that are being reported in addition to those already reported in a current public Form 13F report for the same period. If the Manager is filing the Form 13F report as an amendment, then, the Manager must check the amendment box on the Cover Page; enter the amendment number; and check the appropriate box to indicate whether the amendment (a) is a restatement or (b) adds new holdings entries. Each amendment must include a complete Cover Page and, if applicable, a Summary Page and Information Table. See rule 13f-1(a)(2) [17 CFR 240.13f-1(a)(2)].

5. Present the Cover Page and the Summary Page information in the format and order provided in the form. The Cover Page may include information in addition to the required information, so long as the additional information does not, either by its nature, quantity, or manner of presentation, impede the understanding or presentation of the required information. Place all additional information after the signature of the person signing the report (immediately preceding the Report Type

section). Do not include any additional information on the Summary Page or in the Information Table.

6. Designate the Report Type for the Form 13F report by checking the appropriate box in the Report Type section of the Cover Page, and include, where applicable, the List of Other Managers Reporting for this Manager (on the Cover Page), the Summary Page and the Information Table, as follows:

   a. If all of the securities with respect to which a Manager has investment discretion are reported by another Manager (or Managers), check the box for Report Type "13F NOTICE," include (on the Cover Page) the List of Other Managers Reporting for this Manager, and omit both the Summary Page and the Information Table.

   b. If all of the securities with respect to which a Manager has investment discretion are reported in this report, check the box for Report Type "13F HOLDINGS REPORT," omit from the Cover Page the List of Other Managers Reporting for this Manager, and include both the Summary Page and the Information Table.

   c. If only part of the securities with respect to which a Manager has investment discretion is reported by another Manager (or Managers), check the box for Report Type "13F COMBINATION REPORT," include (on the Cover Page) the List of Other Managers Reporting for this Manager, and include

both the Summary Page and the Information Table.

Summary Page:

7. Include on the Summary Page the Report Summary, containing the Number of Other Included Managers, the Information Table Entry Total and the Information Table Value Total.

   a. Enter as the Number of Other Included Managers the total number of other Managers listed in the List of Other Included Managers on the Summary Page, not counting the Manager filing this report. See Special Instruction 8. If none, enter the number zero ("0").

   b. Enter as the Information Table Entry Total the total number of line entries providing holdings information included in the Information Table.

   c. Enter as the Information Table Value Total the aggregate fair market value of all holdings reported in this report, i.e., the total for Column 4 (Fair Market Value) of all line entries in the Information Table. The Manager must express this total as a rounded figure, corresponding to the individual Column 4 entries in the Information Table. See Special Instruction 9.

8. Include on the Summary Page the List of Other Included Managers. Use the title, column headings and format provided.

   a. If this Form 13F report does not report the holdings of any Manager other than the Manager filing this report, enter the word "NONE" under the title and omit the column headings and list entries.

   b. If this Form 13F report reports the holdings of one or more Managers other than the Manager filing this report, enter in the List of Other Included Managers all such Managers together with their respective Form 13F file numbers, if known. (The Form 13F file numbers are assigned to Managers when they file their first Form 13F.) Assign a number to each Manager in the List of Other Included Managers, and present the list in sequential order. The numbers need not be consecutive. The List of Other Managers must include all other Managers identified in Column 7 of the Information Table. Do not include the Manager filing this report.

Information Table:

9. In determining fair market value, use the value at the close of trading on the last trading day of the calendar year or quarter, as appropriate. Enter values rounded to the nearest one thousand dollars (with "000" omitted).

10. A Manager may omit holdings otherwise reportable if the Manager holds, on the period end date, fewer than 10,000 shares (or less than $200,000 principal amount in the case of convertible debt securities) and less than $200,000 aggregate fair market value (and option holdings to purchase only such amounts).

11. A Manager must report holdings of options only if the options themselves are Section 13(f) securities. For purposes of the $100,000,000 reporting threshold, the Manager should consider only the value of such options, not the value of the underlying shares. The Manager must give the entries in Columns 1 through 5 and in Columns 7 and 8 of the Information Table, however, in terms of the securities underlying the options, not the options themselves. The Manager must answer Column 6 in terms of the discretion to exercise the option. The Manager must make a separate segregation in respect of securities underlying options for entries for each of the columns, coupled with a designation "PUT" or "CALL" following such segregated entries in Column 5, referring to securities subject respectively to put and call options. A Manager is not required to provide an entry in Column 8 for securities subject to reported call options.

12. Furnish the Information Table using the table title, column headings and format provided. Provide column headings once at the beginning of the Information Table; repetition of column headings on subsequent pages is not required. Present the table in accordance with the column

instructions provided in Special Instructions 12.b.i through 12.b.viii. Do not include any additional information in the Information Table. Begin the Information Table on a new page; do not include any portion of the Information Table on either the Cover Page or the Summary Page.

a. In entering information in Columns 4 through 8 of the Information Table, list securities of the same issuer and class with respect to which the Manager exercises sole investment discretion separately from those with respect to which investment discretion is shared. Special Instruction 12.b.vi for Column 6 describes in detail how to report shared investment discretion.

b. Instructions for each column in the Information Table:

   i. Column 1. Name of Issuer. Enter in Column 1 the name of the issuer for each class of security reported as it appears in the current official list of Section 13(f) Securities published by the Commission in accordance with rule 13f-1(c) (the "13F List"). Reasonable abbreviations are permitted.

   ii. Column 2. Title of Class. Enter in Column 2 the title of the class of the security reported as it appears in the 13F List. Reasonable abbreviations are permitted.

iii. Column 3. CUSIP Number. Enter in Column 3 the nine (9) digit CUSIP number of the security.

iv. Column 4. Market Value. Enter in Column 4 the market value of the holding of the particular class of security as prescribed by Special Instruction 9.

v. Column 5. Amount and Type of Security. Enter in Column 5 the total number of shares of the class of security or the principal amount of such class. Use the abbreviation "SH" to designate shares and "PRN" to designate principal amount. If the holdings being reported are put or call options, enter the designation "PUT" or "CALL," as appropriate.

vi. Column 6. Investment Discretion. Segregate the holdings of securities of a class according to the nature of the investment discretion held by the Manager. Designate investment discretion as "sole" (SOLE); "shared-defined" (DEFINED); or "shared-other" (OTHER), as described below:

(A) Sole. Designate as "sole" securities over which the Manager exercised sole investment discretion. Report "sole" securities on one line. Enter the word SOLE in Column 6.

(B) Shared-Defined. If investment discretion is shared with controlling and controlled companies (such as bank holding companies and their subsidiaries); investment advisers and investment companies advised by those advisers; or insurance companies and their separate accounts, then designate investment discretion as "shared-defined" (DEFINED).

For each holding of DEFINED securities, segregate the securities into two categories: those securities over which investment discretion is shared with another Manager or Managers on whose behalf this Form 13F report is being filed, and those securities over which investment discretion is shared with any other person, other than a Manager on whose behalf this Form 13F report is being filed.

Enter each of the two segregations of DEFINED securities holdings on a separate line, and enter the designation DEFINED in Column 6. See Special Instruction vii for Column 7.

(C) Shared-Other. Designate as "shared-other" securities (OTHER) those over which investment discretion is shared

in a manner other than that described in Special Instruction (B) above.

For each holding of OTHER securities, segregate the securities into two categories: those securities over which investment discretion is shared with another Manager or Managers on whose behalf this Form 13F report is being filed, and those securities over - which investment discretion is shared with any other person, other than a Manager on whose behalf this Form 13F report is being filed.

Enter each segregation of OTHER securities holdings on a separate line, and enter the designation "OTHER" in Column 6. See Special Instruction vii for Column 7.

NOTE: A Manager is deemed to share discretion with respect to all accounts over which any person under its control exercises discretion. A Manager of an institutional account, such as a pension fund or investment company, is not deemed to share discretion with the institution unless the institution actually participated in the investment decision-making.

vii. Column 7. Other Managers. Identify each other Manager on whose behalf this Form 13F report is being filed with whom

investment discretion is shared as to any reported holding by entering in this column the number assigned to the Manager in the List of Other Included Managers.

Enter this number in Column 7 opposite the segregated entries in Columns 4, 5 and 8 (and the relevant indication of shared discretion set forth in Column 6) as required by the preceding special instruction. Enter no other names or numbers in Column 7.

A Manager must report the conditions of sharing discretion with other Managers consistently for all holdings reported on a single line.

viii. Column 8. Voting Authority. Enter the number of shares for which the Manager exercises sole, shared, or no voting authority (none) in this column, as appropriate.

The Commission deems a Manager exercising sole voting authority over specified "routine" matters, and no authority to vote in "non-routine" matters, for purposes of this Form 13F report to have no voting authority. "Non-routine" matters include a contested election of directors, a merger, a sale of substantially all the assets, a change in the articles of incorporation affecting the rights of shareholders, and a change in

fundamental investment policy; "routine" matters include selection of an accountant, uncontested election of directors, and approval of an annual report.

If voting authority is shared only in a manner similar to a sharing of investment discretion which would call for a response of "shared-defined" (DEFINED) under Column 6, a Manager should report voting authority as sole under subdivision (a) of Column 8, even though the Manager may be deemed to share investment discretion with that person under Special Instruction 12.b.vi.

13. Preparation of the electronic filing:

a. No line on the Cover Page or the Summary Page may exceed 80 characters in length. See rule 305 of Regulation S-T [17 CFR 232.305].

b. No line in the Form 13F Information Table may exceed 132 characters in length. See rule 305 of Regulation S-T [17 CFR 232.305].

c. If the Form 13F Report Type is "13F HOLDINGS REPORT" or "13F COMBINATION REPORT," then place on EDGAR <PAGE> tag at the end of the Cover Page and one <PAGE> tag at the end of the Summary Page. Additional EDGAR <PAGE> tags are not required. Those electing to include additional <PAGE> tags

should, for each page containing a <PAGE> tag, include no more than sixty (60) lines per page, including the line on which the <PAGE> tag is placed.

d. In preparing the Form 13F report for electronic filing, a Manager may omit underscoring used in the form to indicate the placement of information that the Manager is to furnish.

e. Use the following EDGAR submission types for the following Form 13F Report Types:

Form 13F Report Type	EDGAR Submission Type
13F HOLDINGS REPORT	
Initial Filing	13F-HR
Amendments	13F-HR/A
13F NOTICE	
Initial Filing	13F-NT
Amendments	13F-NT/A
13F COMBINATION REPORT	
Initial Filing	13F-HR
Amendments	13F-HR/A

PAPERWORK REDUCTION ACT INFORMATION

Persons who are to respond to the collection of information contained in this form are not required to respond to the collection of information unless the form displays a currently valid OMB control number.

Section 13(f) of the Exchange Act requires the Commission to adopt rules creating a reporting and disclosure system to collect specific information and to disseminate such information to the public. Rule 13f-1 under the Exchange Act (17 CFR 240.13f-1) requires institutional investment managers who exercise investment discretion over certain accounts of equity securities described in Section 13(d)(1) of the Exchange Act [15 U.S.C. 78m(d)(1)] (generally, exchange traded or NASDAQ-quoted securities) having, in the aggregate, a fair market value of at least $100,000,000 to file quarterly reports with the Commission on Form 13F with respect to the value of those securities over which they have investment discretion.

The purpose of Form 13F is to provide a reporting and disclosure system to collect specific information and to disseminate such information to the public about the holdings of institutional investment managers who exercise investment discretion over certain accounts of equity securities described in Section 13(d)(1) of the Exchange Act [15 U.S.C. 78m(d)(1)] (generally, exchange traded or NASDAQ-quoted securities) having, in the aggregate, a fair market value of at least $100,000,000. We believe that investors will find Form 13F report information useful in tracking institutional investor holdings in their investments and that issuers, too, will find detail as to institutional investor holdings useful because much of their shareholder list may reflect holdings in "street name" rather than beneficial ownership. We believe that mandatory electronic dissemination of this data will help ensure timely and efficient dissemination of this important information. We believe that these reports should have the same degree of availability as other filings with the Commission, and that electronic

filing will speed their dissemination in accordance with the intent of Congress.

We estimate that each filer spends an average of 24.7 hours preparing each quarterly report. In addition, we estimate that, each quarter, approximately 133 managers will resubmit information to: (1) correct an error or omission; or (2) supplement a request for confidential treatment that expires or is denied, and that each such manager will spend an additional 4 hours on the resubmission.

Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

Responses to the collection of information are mandatory. See Section 13(f) of the Exchange Act [15 U.S.C. 78m(f)] and rule 13f-1 [17 CFR 240.13f-1] thereunder.

Section 13(f)(3) of the Exchange Act [15 U.S.C. 78m(f)(3)] authorizes the Commission, as it determines necessary or appropriate in the public interest or for the protection of investors, to delay or prevent public disclosure of any information filed under Section 13(f) upon request. It also prohibits the Commission from disclosing to the public information identifying securities held by the account of a natural person or any estate or trust (other than a business trust or investment company).

This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. Section 3507.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 13F

FORM 13F COVER PAGE

Report for the Calendar Year or Quarter Ended:_____

Check here if Amendment [ ]; Amendment Number:___
This Amendment (Check only one.):
[ ] is a restatement.
[ ] adds new holdings entries.

Institutional Investment Manager Filing this Report:

Name: _____
Address: _____
_____
_____

Form 13F File Number: 28-_____

The institutional investment manager filing this report and the person by whom it is signed hereby represent that the person signing the report is authorized to submit it, that all information contained herein is true, correct and complete, and that it is understood that all required items, statements, schedules, lists, and tables, are considered integral parts of this form.

Person Signing this Report on Behalf of Reporting Manager:

Name: _____
Title: _____
Phone: _____

Signature, Place, and Date of Signing:

_____	_____	_____
[Signature]	[City, State]	[Date]

[ ] 13F HOLDINGS REPORT. (Check here if all holdings of this reporting manager are reported in this report.)

[ ] 13F NOTICE. (Check here if no holdings reported are in this report, and all holdings are reported by other reporting manager(s).)

[ ] 13F COMBINATION REPORT. (Check here if a portion of the holdings for this reporting manager are reported in this report and a portion are reported by other reporting manager(s).)

List of Other Managers Reporting for this Manager:
[If there are no entries in this list, omit this section.]

Form 13F File Number	Name
28-_____	_____

[Repeat as necessary.]

FORM 13F SUMMARY PAGE

Report Summary:

Number of Other Included Managers: _____

Form 13F Information Table Entry Total: _____

Form 13F Information Table Value Total: _____
(thousands)

List of Other Included Managers:

Provide a numbered list of the name(s) and Form 13F file number(s) of all institutional investment managers with respect to which this report is filed, other than the manager filing this report.

[If there are no entries in this list, state "NONE" and omit the column headings and list entries.]

No.	Form 13F File Number	Name
___	28-_____	_____

[Repeat as necessary.]

FORM 13F INFORMATION TABLE

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5			COLUMN 6	COLUMN 7	COLUMN 8		
NAME OF ISSUER	TITLE OF CLASS	CUSIP	VALUE (x$1000)	SHRS OR PRN AMT	SH/ PRN	PUT/ CALL	INVESTMENT DISCRETION	OTHER MANAGER	VOTING AUTHORITY SOLE	SHARED	NONE

[Repeat as Necessary]

APPENDIX J

S. REP. 94-75, S. Rep. No. 75, 94TH Cong., 1ST Sess. 1975, 1975 U.S.C.C.A.N. 179, 1975 WL 12347 (Leg.Hist.)

* * *

***256** same incentive to hasten pretrial proceedings which the Commission is required to have. The countervailing factors-- conservation of work and expense by the courts and the litigants, their counsel, and witnesses-- would be well served by combining related private suits whenever appropriate and allowing the Commission's public action to proceed unfettered by them.

X. INSTITUTIONAL DISCLOSURE

S. 249 would amend Section 13 of the Exchange Act by adding a new Subsection (f), which would authorize the Commission to require ***78** the disclosure of certain institutional portfolio holdings and transactions.

A. HISTORICAL BACKGROUND

1. Background of the 1960's

***75** During the middle and late 1960's, the amount of securities held and traded by institutional investment managers increased materially, both in absolute terms and in relation to other types of investors. Many people became concerned about the

effects of such an increase upon the securities markets, upon the issuers of the securities, and upon the interests of individual investors. At that time, however, while numerous studies had considered some individual aspects of what was perceived to be a problem of much larger dimensions, there was no centrally located body of data. Thus, there was an overriding need to locate basic facts about all types of institutional investment managers, including banks, insurance companies, investment advisers, and investment companies.

Congress, in authorizing the SEC to undertake its Institutional Investor Study, made clear its expectation and intent that that Study provide a comprehensive economic analysis of investment by institutional gaps in information about the investment activities of institutional investment managers and their impacts on both securities markets and corporate issuers. In July 1968, Congress specifically directed the SEC to make a study and investigation of the purchase, sale, and holding of securities by institutional investors of all types (including, but not limited to, banks, insurance companies, mutual funds, employee pension and welfare funds, and foundation and college endowments) in order to determine the effect of such purchasers, sales, and holdings upon (A) the maintenance of fair and orderly securities markets, (B) the stability of such markets, both in general and for individual securities, (C) the interests of the issuers of such securities, and (D) the interests of the public, in order that the Congress may determine what measures, if any, may be necessary and appropriate in the public interest and for the protection of investors.

Public Law No. 90-438 (July 29, 1968).

*257 2. The Institutional Investors Study Report

(a) Findings.-- The Institutional Investor Study was directed and staffed largely by professional economists drawn from outside the SEC staff and had associated with it a statutory Advisory Committee. The Institutional Investor Study Report (H.R. Doc. No. 64, 92d Cong., 1st Sess. 1971) consists of four major parts in eight volumes. Part One sets forth basic background information about the analysis of institutional investors through 1968. Part Two reviews different institutions as investment managers, setting forth information as to each type of institution regarding: the size distribution of firms within each category, the number, size, types, growth, and distribution of assets in accounts managed by each type of institution; and fees *79 charged by an portfolio turnover for the various types of institutions. This part also examines the effects on specific types of institutions' portfolio managers of their employment by such types of institutions, as well as affiliation between such institutions and other firms. In Part Three of the Report, the Study focuses on the impact of increases in the volume and character of institutional holdings and trading on price volatility, market structure, and the securities industry. Finally, Part Four analyzes institutional participation in new issues and the role of institutions as large and influential shareholders in portfolio companies.

*76 The Report also summarized existing reporting requirements for institutional investment managers. Generally, both state and federal regulatory agencies request only that information which seems necessary

and appropriate for their specific regulatory purposes. On the federal level, disclosure of securities holdings and trading has been most detailed with respect to investment companies registered under the Investment Company Act of 1940 and on the state level by insurance companies to state regulatory authorities. Specific disclosures by other types of institutional investment managers are either relatively rudimentary or entirely undeveloped. Rules adopted under the Investment Company Act of 1940 currently require registered investment companies to disclose their holdings of securities in their periodic reports to shareholders and in quarterly filings, which are public, with the SEC. Insurance companies are currently required to provide similar information to state regulatory authorities, occasionally on a quarterly basis in some states and annually in most states, but the disclosures are not often made to shareholders or policyholders.

(b) Recommendations.-- The SEC, in its Letter of Transmittal submitting the Report to Congress, stated certain initial conclusions and recommendations regarding the Study's analysis of the area. The SEC's first conclusion was that the past and likely future growth of institutional investment managers makes essential that timely information about institutional holdings and trading in the equity security markets be collected on an on-going basis by the agency responsible for administration of the federal securities laws. The Commission also stated that the course of future developments could not be accurately gauged, or reasoned regulatory policies be determined, without a continuing flow of such information. To implement these conclusions, the SEC recommended that the Exchange Act be amended to provide it *258 with

authority to require reports and disclosure of securities holdings and transactions from all types of institutional investment managers.

3. Other Calls for Improved Disclosure

The President's Commission on Financial Structure and Regulation (the 'Hunt Commission') recommended in 1971 that all corporate fiduciaries be required to file with the appropriate regulatory agency a report detailing: (1) the twenty largest stock holdings, in terms of market value, unless they do not exceed $10 million; (2) all holdings which constitute 5 percent or more of the outstanding shares of a corporation registered with the SEC; (3) dollar values with respect to each holding broken down into categories reflecting the degree of voting responsibility; (4) interlocked officers or directors *80 with portfolio companies where the bank had sole voting responsibility; and (5) instances where the bank voted against management.[2]

Beginning in 1971, several of the nation's major banks voluntarily began disclosing certain details of their trust departments' largest securities holdings and transactions. In the summer of 1974 the Comptroller of the Currency followed this lead and adopted amendments to his Regulation 9 to require certain national banks to disclose certain of their securities holdings and transactions. Specifically, the Comptroller's amendments require any national bank holdings equity securities in its trust department with an aggregate fair market value of $75 million or more to file with his Office: (1) an annual report setting forth certain specified information concerning holdings of equity securities for which it acts as trustee, executor, administrator, or guardian (whether or not

it has investment authority) and any other accounts over which it has investment authority either alone or with others; and (2) quarterly reports setting forth certain specified information with respect to the purchase or sale during the quarter of any equity security having a fair market value of $500,000 or more, or involving 10,000 shares or more. The required annual reports do not include information with respect to any equity security the aggregate holding of which was 10,000 shares or less or the assets of any investment company to which the reporting bank provides investment advice or counsel. The Comptroller would have discretion, upon written request, to keep confidential any information which would identify the holdings of assets of any natural person, trust, or estate and to keep confidential, temporarily, any transactional data which would reveal an investment strategy.

*77 Related to the need for disclosure by institutional investment managers of their securities holdings and transactions is the need for the management of individual companies to be able to identify the holders of their stock. Institutional investment managers have customarily used nominees, officers and employees of the institutions to hold legal title in 'street name' to stock certificates to allow the institution greatest flexibility in transferring the stock certificates. This practice may impede company management in its attempts to communicate directly with the beneficial owners of its securities. Senators Metcalf and Muskie, as chairman of two subcommittees of the Committee on Government Operations have long been interested in this problem and sponsored a study in December, 1973, which focused attention on some of the public policy

implications of the practice of using 'street *259 names.' [3] Subsequently, Senators Metcalf and Muskie chaired highly successful hearings on the issues raised by their report, and have obtained the assurances and cooperation of all affected federal agencies *81 in cutting through this extra layer of unnecessary secrecy. [4] The Committee fully concurs in their efforts and believes that S. 249 is a carefully drawn response to the problem.

4. Recommendations

In its Securities Industry Study Report, the Subcommittee on Securities stated:

The Commission has no authority comparable to that in section 11(a) to deal with either 'excessive' trading by non-members, e.g., institutions, on exchanges or 'excessive' trading by members or non-members in the third market. These omissions are understandable in a statute passed at a time when institutions owned less than 8.5% of outstanding NYSE-listed securities and there was no third market to speak of. However, financial institutions now own over 28% of outstanding NYSE-listed securities and account for over 52% of NYSE dollar volume. Moreover, in relation to many exchange members, financial institutions often have equal or better access to market information and execution facilities. As for trading in the third market, which now amounts to more than 8% of the value of NYSE, volume, the imminent implementation of a composite tape for all trading in listed stocks may greatly increase the impact on securities prices of trading in that market.

The formulation of policy decisions with regard to institutional impact on the markets for equity securities has proven to be a difficult undertaking. In 1968 the Congress directed the SEC to study the purchase, sale and holding of equity securities by institutions, in order to determine, among other things, their effect on 'the maintenance of fair and orderly securities markets' and 'the stability of such markets.' The Institutional Investor Study, conducted by the SEC pursuant to that mandate, found that 'institutional trading overall has not impaired price stability in the markets' and that 'even on an inter-day basis, institutional trading appeared to offset price movements about as frequently as it appeared to contribute to them.'

*78 These conclusions, however, were based exclusively on aggregate statistical data. Since the 'Study could not and did *260 individually examine institutional transactions,' its data could 'not negate the possibility that one or more institutions trading at particular times in particular securities did impair price stability or otherwise act in a manner contrary to the public interest.' The omission by the Commission to study individual instances of institutional decision making and market impact is disturbing in light of sudden sharp drops that have occurred recently from time to time in the price of widely traded securities. Published stories have attributed these drops to massive institutional selling triggered by the failure of the issuer to meet earnings goals or other unfavorable information.

*82 If public confidence in the markets is to be maintained, the SEC has an obligation to investigate these market irregularities and determine to what

extent they may have been caused by institutional trading practices that may be inconsistent with the public interest in the stability of the markets. In its letter transmitting the Institutional Investor Study to the Congress in April 1971, the SEC asked that the Exchange Act be amended 'to provide the Commission with general authority to require reports and disclosures of . . . holdings and transactions from all types of institutional investors.' However, no specific legislative proposal has yet been submitted by the SEC for Congressional consideration. The Subcommittee believes that the SEC should obtain regular and comprehensive information regarding institutional transactions which contribute to unusual price movements, so that it will be continuously in a position to impose or recommend appropriate restrictions if they are required. If the SEC feels that it does not presently have adequate authority to obtain such information, the Exchange Act should be amended to provide it with such authority. (Footnotes deleted.)

The Committee fully concurs in this judgment and believes S. 249 is a carefully drawn response to this need.

B. USES FOR THE INFORMATION

1. Public Use

Perhaps the most important justification for the information collection program which this bill would authorize is the need to collect and disseminate to individual investors data about institutional investment managers. Many people believe that it is not possible to make informed investment decisions on a security without information related to the likely

market activity and the degree of institutional concentration in the security. Institutional concentration may suggest a number of things to a variety of investors. For example, to some it may be a good sign because it may suggest that sophisticated investors believe the security is a good investment. To others, it may be a danger sign indicating a potential depressing 'overhang,' market illiquidity, *261 or high price volatility. That different investors may draw different conclusions from the data is not important; rather, what is important is that information about the securities holdings and certain transactions of institutional investment managers be available to all investors-- both institutional and individual-- so that they can all have it, whatever its relative usefulness in making their independent judgments. Thus, with the dissemination of data about institutional investment managers, an institutional disclosure program should stimulate a higher degree of confidence among all investors in the integrity of our securities markets.

*79 In that connection, firms with computer processing capabilities may be interested in obtaining institutional disclosure data for subsequent sale to interested persons. Several such firms now offer to their subscribers an analysis of the investment data disclosed by registered investment companies and an analysis of the investment data disclosed *83 by bank-managed common trust funds. It is generally understood that many persons in the securities and banking industries find those analyses very informative and useful. A number of pension fund managers subscribe to such services for assistance in planning their investment return objectives and evaluating the investment performances of their investment manager. Interpretation of the

institutional disclosure data by private service firms and institutional investment managers would tend to sharpen competition among investment managers by providing consumers with detailed comparative data about their investment activities. As levels of investment through institutional investment management intermediaries rise, especially in view of the new pension reform legislation, the need for such information becomes increasingly important.

2. Use by Regulatory Agencies

Moreover, the SEC, bank regulatory agencies, and other agencies (both federal and state) could be expected to make extensive use of the institutional disclosure data in fulfilling their responsibilities to consider and develop standards designed to protect the public interest within a consistent and coordinated regulatory framework. It would be expected that the SEC might use the institutional disclosure data in two generally different ways: to analyze the characteristics of institutional investment managers, and to analyze the impact of institutional investment managers on the securities markets.

With respect to the first of these areas of interest, all institutional investment managers share the need to value large securities holdings. Accurate valuation of large securities holdings is the touchstone of investor confidence in investment management relationships because valuation determines the incoming cost of participation, the size of an on-going interest, and the value of the out-going payment, not to mention the basis for investment management compensation arrangements. Similarly, it is important to provide better information about the investment

results and investment strategies of different institutional investment managers, including portfolio volatility and portfolio turnover. Equally important is an investment manager's practice or procedure in the allocation of investment opportunities among his different accounts, where such institutional investment manager advises a multitude of types of accounts. A conflict of interest between the different ***262** accounts may also occur with regard to the allocation of investment research and so-called market information. Accurate reports of institutional investment manager portfolio activity reported separately for each type of account under investment management would provide helpful insight into current allocation practices. Finally a last area of study regarding the characteristics of different institutional investment managers, which is also related to the development of a national market system, is the share acquisition and disposition patterns of different managers. Different managers may prefer to execute all or many of their accounts' portfolio transactions in a particular market in reliance on their best judgment of best price and execution. Additional information in this area may be helpful in the development of the future structure of a national market system and may also be helpful to fiduciaries concerned with the reasonableness of their own portfolio transactions.

***80** ***84** The second major area of particular interest to the SEC would be the impact of securities holdings and trading by institutional investment managers on the securities markets. Some persons have suggested that institutional investment managers tend to 'gang up' on a particular security with resulting impact on the price and the liquidity of

the security. Although the Institutional Investor Study Report concluded that based on the data available to the Study trading tended to result in net daily trading imbalances, only a small fraction of all month-to-month price changes could be associated with institutional imbalances. Thus, one area of study might be the relationship, if any, between concentration in specific securities, concentrated trading by institutional investment managers, and block trading on price volatility in a given security. Similarly, inclusion of so-called fourth market trades--that is, direct trading between institutional investment managers-- in the institutional disclosure data would enable the SEC to consider whether elements of a national market system, such as last sale reports, and clearance of limit orders, should include the fourth market.

Another phenomenon related to a national market system in the increasing amount of block trading. The Institutional Investor Study Report concluded that the combination of block trading with investment management was troublesome because of the potential conflict of interest when a block trade assembler has accounts over which it exercises investment discretion and which participate in its block trades. Not only direct participants in the block trade, but also other investors trading in the same securities in the same and other markets, can be affected by block purchases and sales by large institutions. Continuing information about large trades could be useful in analyzing, for example, market-making and specialist functions, and differences in discounts obtainable in various markets. Institutional trading also has an impact on brokerage services and on the securities industry, and continuing information about equity securities transactions and

securities holdings could be helpful in analyzing the extent to which institutional investment manager business: (1) is distributed across or concentrated in various members of the securities industry; (2) affects commission rates; (3) affects the execution, clearance, and settlement functions of firms in the securities industry; (4) affects broker-dealer financial responsibility rules; and (5) affects or encourages the ***263** existence of any reciprocal practices. Many other such uses connected with implementation of the central market system may appear when the SEC has gained sufficient administrative experience with the institutional disclosure data.

Bank regulatory agencies, state insurance regulators, and federal and state regulators of other persons falling within the definition of 'institutional investment manager' should also find the institutional disclosure data to be of significant help. The data could be used to identify areas for close attention during examinations or inspections by the regulatory agency. It could also serve generally as a benchmark for comparisons of one institutional investment manager with comparable institutional managers; such comparisons might focus on the relative avoidance or use of specific securities markets or any dramatically different choices, in the aggregate, of brokers for execution.

*85 C. SCOPE AND NATURE OF THE PROVISION

***81** The primary purpose of this section of the bill is to create a central depository of historical and current data about the investment activities of institutional investment managers. The Committee believes that subjecting certain institutional

investment managers to the reporting requirements of the bill will advance two important public policy and regulatory objectives.

First, it will substantially improve the body of factual data about large investment managers which is available to individuals, to federal and state regulatory agencies, and to other institutional investment managers. The lack of such data has prevented and inhibited careful consideration by interested persons of the public policy implications. While expanding the reporting burden for certain institutional investment managers may result in some initial expense to some investment managers, it is nevertheless clear that it is now appropriate to begin to accumulate such a body of data to permit reasoned discussion and decisions about the influence and impact of the large institutional investment managers on the securities markets.

Second, it is important to fix responsibility for gathering, processing, and disseminating the institutional disclosure data in one federal agency. In this respect, the Committee regards the disclosure regulations for national banks adopted by the Comptroller of the Currency as helpful in achieving greater disclosure for one type of institutional investment manager; however, the Comptroller's regulations cover only a part of the institutional disclosure area and the Committee believes that there is a need for a uniform data base with a single collection point. Thus, the SEC, with its broad concern with the fairness of the securities markets and expertise and responsibilities in development of the future structure of a national market system, would be, in the committee's view, the best agency to serve as

the central collection point. The regulatory needs of the Comptroller, which apparently created the need for his regulations, can be met satisfactorily by receiving from national banks a copy of the disclosure report filed with the SEC. In this way, uniform reporting standards can be established through coordination with other state and federal regulatory agencies to minimize, to the largest extent reasonably possible, the wasted costs *264 and efforts associated with filing multiple reports, each different from the other, with numerous agencies for differing regulatory purposes. Accordingly, the impact of the bill is limited, at least initially, to the largest institutional investment managers, although the bill would give the SEC rule-making authority to lower the securities holdings cut-off test if it found that a lower test requiring more institutional investment managers to report was in the public interest, for the protection of investors, or necessary or appropriate to maintain fair and orderly markets.

The bill vests ultimate authority and responsibility for the institutional disclosure program with the SEC but would require it to take such steps as may be within its power, including consulting with certain specified federal and state regulatory authorities, national securities exchanges, and national securities organizations to achieve uni- *86 form, centralized reporting of securities holdings and transactions. In addition, those federal authorities would be required to cooperate with the SEC in the performance of its responsibilities. (Section 13(f)(4)).

1. Jurisdictional tests and reporting requirements

*82 S. 249 would require every institutional investment manager which uses the mails, any other means or instrumentality of interstate commerce, or any facility of a national securities exchange in the course of its business as an institutional investment manager and which exercises investment discretion, as defined in Section 3(a)(35), with respect to accounts holding $100 million of equity securities of a class described in Section 13(d)(1) ('Section 13(d)(1) securities') to file certain reports with the SEC. (Section 13(f)(1)). Reporting of certain information regarding other securities is left to Commission rule making and to that end the Commission would be vested with broad discretion under the bill. Initially, the SEC has estimated that approximately 300 persons-- holding about 75% of all institutional equity security holdings-- would be subject to the reporting provisions of the bill. It is expected that by limiting initially the impact of the reporting provisions to the largest institutional investment managers, the institutional disclosure program could be implemented rapidly with the least amount of unnecessary costs and burdens on the potential respondents. If the SEC should determine that the public interest would be better served by bringing into the program certain smaller institutional investment managers, it has rulemaking authority to reduce the securities holdings cut-off figure to $10 million (Section 13(f)(1)). The SEC has stated that, before it reduced the securities holdings cut-off figure, it would consider the cost and burden to such smaller institutional investment managers of preparing such reports. In establishing that cut-off figure, and in establishing the frequency of reports required to be filed, the Commission would also

balance such costs and burdens to the public interest that would be served by the expected informational value of the marginal equity securities holdings which would then be subject to the reporting provisions.

It is expected that the Commission would require by rule that institutional investment managers file reports quarterly which would contain certain specified information regarding Section 13(d)(1) securities held for discretionary accounts. Such information could be arrayed in the report either by type of account or in terms of aggregate holdings. *265 (Section 13(f)(1)). In addition to information concerning such securities holdings, the SEC could require such institutional investment managers to disclose similar information regarding their holdings of other securities excluding exempted securities, the aggregate value of their holdings of exempted securities, their voting power with respect to Section 13(d)(1) securities, and the details of any transaction or series of transactions in a Section 13(d)(1) security involving at least $500,000. (Section 13(f)(1).) Here again, the size of the equity security transactions to be reported has been set initially at a level which would involve only institution-size trades. While the number of equity security trades this figure would actually cover is not clear, the SEC would have broad, discretionary rule-making authority to lower the size of the transaction to be reported. For example, The *87 SEC could adopt a lower transaction size related to common definitions of a 'block trade', for example, $250,000, or, if appropriate, some smaller amount. (Section 13(f)(1)(E)).

2. Public Availability of the Institutional Disclosure Reports

*83 One of the important purposes of the bill would be dissemination of the institutional disclosure data to the public. Accordingly, except where confidential treatment is appropriate, the SEC would be required to tabulate the information in a manner which enhances its usefulness to other federal and state authorities and the public and to make the information contained therein conveniently available to the public for a reasonable fee. In addition, the Commission must make available to the public, for a reasonable fee, a list of all equity securities of a class described in Section 13(d)(1). (Section 13(f)(3)). One of the purposes of the list referred to in Section 13(f)(3) is to enable investment managers to determine which securities are to be included in their reports. Consequently, the list should be made available in sufficient time before the relevant reporting period.

The Committee believes that generally it is in the public interest to grant confidential treatment to an ongoing investment strategy of an investment manager. Disclosure of such strategy would impede competition and could cause increased volatility in the market place. Consequently, the Committee intends that the Commission, in exercising its authority under Section 13(f)(3) to delay or prevent public disclosure of information filed pursuant to Section 13(f)(1), will normally prevent public disclosure of that portion of any report filed by an investment manager covering holdings or transactions which are part of a program of acquisition or disposition in which the investment manager is engaged both at the end of the reporting period and at the time the report is filed.

The institutional disclosure data submitted by institutional investment managers will contain information about the financial affairs of many companies and people, but the institutional disclosure reports would generally be stated in terms of aggregate information by type of account managed by the institutional investor. If, however, the institutional disclosure reports would identify the securities holdings of any natural person or estate or trust (other than a business trust), the SEC is required by the bill to accord such information confidentiality.

*266 Because rapid dissemination of the institutional disclosure information to the public is a fundamental purpose of the bill, and rapid dissemination would be materially enhanced by submission of the information to the SEC in a computer processable form, the bill is drawn broadly enough to enable the SEC to adopt rules, if it finds it appropriate, requiring submission of such information in computer processable form as well as in narrative form by all institutional disclosure respondents.

3. SEC Power to Exempt

The SEC would be empowered to exempt any institutional investment manager or security from any or all of the provisions of the subsection. (Section 13(f)(2)).

*88 4. Annual Reports to the Congress

*84 The Commission would be required to report to the Congress on its use and dissemination of information filed pursuant to this subsection. (Section 23(b)(9)).

5. Definitions

'Institutional investment manager' would be defined broadly to include any person other than a natural person, investing in or buying and selling securities for an account in which it has a financial interest, and any person exercising investment discretion with respect to the account of any other person. (Section 13(f)(5)(A)). 'Investment discretion' would be defined to mean de jure or de facto power to select the securities to be purchased or sold by an account. In addition, the SEC would have the power to include in the definition of 'investment discretion' other appropriate forms of influence over the purchase or sale of securities. (Section 3(a)(35)). Specifically excluded from the definition of 'investment discretion' would be discretion exercised outside the United States with respect to an account outside the United States, but the SEC would have the power, by rule, to subject such discretion to the requirements of the subsection as necessary in furtherance of the purposes of the Exchange Act. (Section 13(f)(5)(B)). To implement the reporting provisions, the Committee is aware that the term 'transaction' will have to be defined and that certain interpretative problems will have to be resolved, such as the exclusion as to a parent company of equity securities of its controlled subsidiaries from the reporting provisions of the bill. It is expected that the SEC would resolve these problems by exercising its rulemaking or exemptive powers.

*89 SECTION-BY-SECTION ANALYSIS

The purposes of this legislation would be accomplished by amending existing sections 2, 3, 6, 11,

12, 13, 15, 15A, 17, 19, 21, 23, 24, 25, 28 and 31 of the Securities Exchange Act of 1934 (the 'Exchange Act'); adding new sections 11A, 15B and 17A to the Exchange Act; amending section 1(b) of the Sec. of August 20, 1962; amending section 9(c) of the securities Investor Protection Act of 1970; and by amending the Investment Advisers Act of 1940 ('Investment Advisers Act') and the Investment Company Act of 1940 ('Investment Company

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*284 finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security by any broker or dealer. With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.

Subsection (k) would consolidate in one place the power the SEC presently has under sections 15(c)(5) and 19(a)(4) of the Exchange Act to suspend summarily trading in any security (other than an exempted security) for a period not exceeding ten days. The SEC's power, with the approval of the President, to suspend summarily all trading on a national securities exchange would be continued and extended to include the power to prohibit trading in all securities, other than exempted securities, otherwise than on an exchange.

Subsection (l) would make it unlawful for an issuer, by use of any means or instrumentality of interstate

commerce or of the mails, to issue, either originally or upon transfer, any security registered under the Act or exempted from registration by specified sections in a form or which a format which contravenes rules prescribed by the Commission for the prompt and accurate clearance and settlement of securities transactions. This provision would not be applicable to variable annuity contracts or variable life policies issued by an insurance company or its separate accounts. The Commission is expected to utilize its power under this section in conjunction with its power under section 4 to bring about appropriate standardization of the documents used in the securities handling process and to require such changes in the form and format of certificates as will facilitate and simplify their handling.

Subsection (m) would instruct the Commission to study and investigate the practice of registering securities other than in the name of the beneficial owner to determine whether such registration is consistent with the policies and purposes of the Exchange Act (particularly sections 12(g), 14, 15(d) and 17A. If the Commission finds that such registration is consistent, it would be further directed to determine ***107** whether steps can be taken to facilitate communication between corporations and their shareholders while at the same time retaining the benefits of such registration. The Commission is instructed to report its preliminary findings to the Congress within six months after enactment and its final results and recommendations within one year of enactment.

***102** Section 9 of the bill would amend the Exchange Act by adding a new subsection (f) to section

13 to authorize the Commission to require institutional investment managers, as defined in section 13(f)(5), to file reports with the SEC disclosing certain of their securities portfolio holdings and transactions.

SECTION 13(f)(1)-THE JURISDICTION TESTS AND REPORTING REQUIREMENTS

Every institutional investment manager which (1) uses, directly or indirectly, the mails or any means or instrumentality of interstate commerce, including the facilities of any national securities exchange, *285 in the course of its business as an investment manager; and (2) exercises investment discretion over any account or accounts containing equity securities registered under the Act or issued by an insurance company or closed-end investment company exempt from such registration (collectively referred to as 'section 13(d)(1) securities') having an aggregate fair market value of at least $100 million at any time during the preceding twelve months, would be required to file such disclosure reports with the Commission as the Commission, by rule, may prescribe. The Commission would have authority to raise or lower the jurisdictional amount from $100 million, but in no event could it require reports from persons exercising investment discretion over less than $10 million of section 13(d)(1) securities. Also the Commission could, by rule, determine the periods for which such reports year or shorter than one quarter.

This paragraph would also set forth the Commission's power to determine the contents of the reports. Institutional investment managers satisfying the jurisdictional tests would be required to disclose

their holdings of all section 13(d)(1) securities. Such reports must include information with respect to the name of the issuer, the title, class and CUSIP number, the number of shares or principal amount, and the aggregate fair market value of each equity security held on the last day of the reporting period. Although it is contemplated that such reports would include aggregate information for those accounts over which the institutional investment manager exercises investment authority, the Commission would retain discretion to require reports by type of account.

In addition to this mandatory information concerning portfolio holdings, the Commission would have authority to require institutional investment managers to report additional information including their holdings of other securities, their voting power with respect to section 13(d)(1) securities, and the details of any transaction or series of transactions in a section 13(d)(1) security involving at least $500,000 and such other related information as the Commission, by rule, may prescribe.

*108 SECTION 13(f)(2)-COMMISSION POWER TO EXEMPT

The Commission would be empowered with broad rulemaking authority to exempt, conditionally or unconditionally, any institutional investment manager or security from any or all requirements of the subsection or the rules thereunder.

SECTION 3(f)(3)-PUBLIC DISCLOSURE OF REPORTS; CONFIDENTIALITY OF INFORMATION

*103 To increase the accuracy of the reporting requirements which the Commission may require under authority of this section and to facilitate the fulfillment by institutional investment managers of the responsibilities under this subsection, the Commission would be required to maintain a list of all equity securities of a class described in Section 13(d)(1) and to update that list with the same frequency as the Commission requires the filing of reports under paragraph (1).

*286 All information filed with the Commission would be publicly available promptly after filing in such form as the Commission prescribes, except that the Commission would be permitted to delay or prevent public disclosure of any information contained in filed reports in appropriate cases in accordance with section 24 of the Act. Further, the SEC would be required to tabulate the information in a manner which would enhance its usefulness to other Federal and State authorities and the public.

SECTION 13(f)(4)-STANDARDS FOR COMMISSION ACTION; COORDINATION OF REPORTS

The Commission would be required to exercise its authority under the section in the public interest and for the protection of investors or to maintain fair and orderly markets. In exercising this authority the Commission would be directed to take such steps as are within its power to achieve uniform, centralized

reporting of information concerning the holdings and transactions of institutional investment managers, to eliminate duplicative reporting by, and to minimize the compliance burdens on, institutional investment managers. In this connection, the Commission would be expressly directed to consult with other Federal and State authorities, national securities exchanges, and registered securities associations. Finally, institutional investment managers which are FDIC insured banks would file copies of all reports required to be filed by the Commission under this subsection with the appropriate bank regulatory agency.

SECTION 13(f)(5)-DEFINITION-INSTITUTIONAL INVESTMENT MANAGER

For the purposes of subsection (f), the term institutional investment manager would be defined to mean any person, except a natural person, investing in or buying and selling securities for its account and any person exercising investment discretion with respect to the account of any other person. The term 'investment discretion' is defined in section 3(a)(35).

*109 Although the definition of institutional investment manager would plainly include foreign institutional investment managers which satisfy the jurisdictional conditions of subsection (f)(1), this paragraph would exclude from the jurisdictional and reporting provisions any account with respect to which the institutional investment manager exercises its investment discretion outside the United States.

The Committee is also aware of legal restraints on disclosure in certain foreign countries and the competitive ramifications for American investment

institutions with foreign branches operating under foreign laws and traditions. It is mindful of the current widespread concern over the potential influence and impact of foreign institutional investment managers on the national securities exchanges and United States capital markets.

*104 Accordingly, although such foreign activities are initially exempted, this subsection would grant the Commission the power by rule to override the exclusion where such action is necessary or appropriate in furtherance of the purposes of the subsection.

*287 Section 10 of the bill would amend Section 15 of the Exchange Act dealing with the registration and regulation of brokers and dealers.

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